Supreme Court, U.S.
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No. ____

In the Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, CEDRUS MONTE, ALLAN D. SOWERS, and LIONEL CORBETT,
Petitioners,

v.

CALIFORNIA BOARD OF PSYCHOLOGY'S EXECUTIVE OFFICER THOMAS O'CONNOR and BOARD MEMBERS MARTIN GREENBERG, et al., and BILL LOCKYER, CALIFORNIA STATE ATTORNEY GENERAL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Psychoanalysis impacts emotional, mental and spiritual health through knowledge and insight. Psychoanalysts listen to a person discuss his or her dreams, thoughts, and actions, and offer interpretations of their underlying or transcendent significance. That can help the person understand his or her unconscious traumas, frustrations, and desires, and appreciate the numinous quality of things and events. That knowledge can have deeply therapeutic and spiritual benefits. California's Psychology, Social Work, and Marriage and Family Therapy Laws make it a crime to charge a fee for psychoanalysis without a license. A license requires years of indoctrination in non-psychoanalytic subjects and viewpoints, such as short-term behavioral counseling.

The questions presented are:

Whether the Court of Appeals erred in holding that the "licensing scheme passes First Amendment scrutiny" for content-neutral laws, without finding that it is reasonable, beneficial, and narrowly tailored.

Whether California's licensing scheme is content and viewpoint based, when:
(a)It restrains only speech with psychological content;
(b)It's goal is to regulate "wise . . . counseling" and the emotive impact of speech on willing listeners;
(c)It's method is to coerce unwilling psychoanalysts to study non-psychoanalytic viewpoints for years.

Whether California's scheme for licensing psychoanalysts is a prior restraint on pure speech that presumptively violates the First and Fourteenth Amendments to the United States Constitution.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are the National Association for the Advancement of Psychoanalysis ("NAAP"), a Delaware corporation, and Cedrus Monte, Allan Dale Sowers, and Lionel Corbett. There is no parent or publicly held company owning 10% or more of NAAP's stock.

Respondents

Respondents are the following California state officials sued in their official capacities only:

- Thomas O'Connor, the executive officer of the California Board of Psychology ("Board");
- Board members Martin Greenberg, Pamela Harmell, Judith Janaro Fabian, Emil Rodolfa, Marilyn Palarea, Mary McMillan, Mary Ellen Early, and Lisa Kalustian; and
- Bill Lockyer, the California Attorney General.

Bill Lockyer, Pamela Harmell and Lisa Kalustian are successors in office to former California Attorney General Daniel E. Lungren and former Board members Bruce Ebert and Linda Hee, and have been substituted as parties pursuant to Supreme Court Rule 35.4 (and Fed. R. App. Proc. 43(c)). The State of California and the Board of Psychology (as a State agency distinct from its members) were named as defendants in the original and first amended complaints. They were dismissed by the district court on Eleventh Amendment immunity grounds (App A at 9a). They were not named as parties in subsequent complaints, were not parties before the Court of Appeals (see App. A at 10a fn. 3), and are not parties to this proceeding.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 228 F.3d 1043 (9th Cir. 2000), and is included in Appendix A at 1a-28a. The Memorandum Decision and Order and the Judgment of the District Court for the Northern District of California are not published. They are included in Appendix B at 29a-51a and 52a-53a, respectively. They were both filed January 7, 1999 and entered January 8, 1999.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Opinion and judgment on September 29, 2000. On October 13, 2000, Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing *En Banc*, which the United States Court of Appeals denied on November 9, 2000 (App. C at 54a-55a). This Petition for Writ of Certiorari is timely filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2106.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION
First Amendment

Congress shall make no law . . . abridging the freedom of speech. . . .

Fourteenth Amendment

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CALIFORNIA BUSINESS AND PROFESSIONS CODE

At issue are three sets of licensing laws in California's Business and Professions Code, and the regulations adopted thereunder in Title 16 of California's Code of Regulations. They are:

- The Psychology Licensing Law (Cal. Bus. & Prof. Code § 2900 et seq. and Cal. Code Regs. Tit. 16, § 1380 et seq.);
- The Marriage and Family Therapists Law (Cal. Bus. & Prof. Code § 4980 et seq. and Cal. Code Regs. Tit. 16, § 1800 et seq., primarily § 1832 et seq.); and
- The Social Work Licensing Law (Cal. Bus. & Prof. Code § 4990 et seq. and Cal. Code Regs. Tit. 16, § 1800 et seq., primarily § 1870 et seq.).

These laws broadly prohibit all personal counseling and psychotherapy for a fee, including psychoanalysis, without a license or exemption. A license generally requires either a master's or doctoral degree and board examinations in certain subjects other than psychoanalysis, and years of supervised experience.

Also involved is the Research Psychoanalyst Law (Cal. Bus. & Prof. Code § 2529 and § 2529.5, and Cal. Code Regs. Tit. 16, § 1367 et seq.). It creates an exemption from

licensure for graduates of four Freudian psychoanalytic institutes in California and institutes "deemed equivalent" by the Medical Board. That exemption is conditioned, however, on the psychoanalysts limiting their paid practice of psychoanalysis to one-third of their professional time, and engaging in qualifying teaching, training or research in any other field two-thirds of their time. The regulations set criteria for psychoanalytic training that is completely different from the training required for a license in psychology, social work, or marriage counseling, and they require licensed therapists to obtain that training to be considered a "graduate psychoanalyst" (see 16 CCR § 1374 and § 1367.1(c)).

The main provisions prohibiting psychotherapy in the Psychology Licensing Law and Marriage and Family Therapy Law, and the basic requirements for a psychology license, are set forth below. The pertinent text of the relevant laws is reproduced in greater detail in Appendix D (56a-71a).

Psychology Licensing Law

Bus. & Prof. Code § 2903. No person may engage in the practice of psychology . . . without a license. . . . The practice of psychology is defined as rendering . . . for a fee . . . any psychological service . . . such as . . . counseling [and] psychotherapy. . . .

* * * * *

Psychotherapy . . . means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive.

* * * * *

Bus. & Prof. Code § 2914. Each applicant for licensure shall comply with all of the following requirements: . . .

(b) Possess an earned doctorate degree (1) in psychology. . . .

(c) Have engaged for at least two years in supervised professional experience under the direction of a licensed psychologist. . . .

(d) Take and pass the examination required by Section 2941. . . .

* * * * *

Bus. & Prof. Code § 2943. The board may examine for knowledge in whatever theoretical or applied fields in psychology as it deems appropriate. . . .

Marriage and Family Therapy Licensing Law

Bus. & Prof. Code § 4980. (a) Many California families and many individual Californians are experiencing difficulty and distress, and are in need of wise, competent, caring, compassionate, and effective counseling in order to enable them to improve and maintain healthy family relationships. . . . Marriage, family, and child counselors provide a crucial support for the well-being of the people and the State of California.

(b) No person may for remuneration engage in the practice of marriage, family, and child counseling as defined by Section 4980.02, unless he or she holds a valid license as a marriage, family, and child counselor . . . .

Bus. & Prof. Code § 4980.02. For the purpose of this chapter, the practice of marriage, family, and child counseling shall mean that service . . . wherein interpersonal relationships are examined for the purpose of achieving more

adequate, satisfying, and productive marriage and family adjustments. . . .

"Th[is] . . . includes . . . the provision of explanations and interpretations of the psychosexual and psychosocial aspects of relationships."

STATEMENT OF THE CASE

Petitioners are three psychoanalysts who wish to practice psychoanalysis professionally in California, and the National Association for the Advancement of Psychoanalysis ("NAAP"), an association of analysts with members who wish to practice in California. NAAP's membership includes 1,000 psychoanalysts and 400 candidates-in-training in thirty-five states, including California. NAAP is dedicated to encouraging the study and practice of psychoanalysis throughout the United States.

California law prohibits psychoanalysts from practicing psychoanalysis *for a fee* without a license or exemption under California's Psychology, Social Work, or Marriage and Family Therapy Licensing Laws. The individual petitioners and some other NAAP members who wish to practice in California are not eligible for a license or exemption.

Respondents are California State officials who vigorously enforce these licensing laws against psychoanalysts and other psychotherapists. They are responsible for having at least one analyst arrested, handcuffed, jailed, charged, and sanctioned for practicing psychology without a license. California residents who have asked for psychoanalysis from the individual petitioners and other NAAP members have been denied it due to this threat of prosecution.

A license is costly. It requires years of indoctrination (mandatory education, examinations and supervised experience) in non-psychoanalytic subjects and viewpoints, such as short-term cognitive and behavioral counseling. California does not offer a license based on psychoanalytic training.

A. THE DISTRICT COURT HELD THAT PSYCHOANALYSIS IS "NOT ENTITLE[D]" TO "FIRST AMENDMENT PROTECTION."

On October 24, 1997, petitioners filed an action in the United States District Court for the Northern District of California seeking a judgment declaring that California's licensing scheme abridges petitioners' and the public's right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution. Petitioners also sought an injunction prohibiting respondents from enforcing those laws against petitioners and other related relief, and asserted other related claims of constitutional violations not at issue here. The district court had jurisdiction under 28 U.S.C. § 1331 and § 1343(a)(3) and (4).

Petitioners allege in detail the nature of their psychoanalytic practices and training (some of those allegations are set forth in Appendix E, 72a-87a). In general, psychoanalysis is a discussion between the analyst and client that focuses on the client's unconscious conflicts and desires. These discussions can lead to self-knowledge and insights that resolve emotional conflicts and promote spiritual growth and personal integration. Petitioners contend that psychoanalysis is pure speech, and its benefits result solely from the direct cognitive and emotive impact of speech.

Petitioners amended their complaint three times, once voluntarily and twice after the district court dismissed it based on a finding that its allegations of standing were conclusory. The district court held that standing is adequately alleged in the Third Amended and Supplemental Complaint. But the court dismissed it with prejudice for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

The district court held that "substantial first amendment rights are not implicated" because the emotive and therapeutic impact of analysis is "not speech" and petitioners "do not face a total ban on speech" (since they may either practice without a fee or satisfy the licensure requirements). (App. B at 43a to 45a.) The court held that:

> " . . . [T]he key component of psychoanalysis is the treatment of emotional suffering and depression, not speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." (App B. at 43a.)

B. THE COURT OF APPEALS HELD THAT "PSYCHOANALYSIS IS ENTITLED TO CONSTITUTIONAL PROTECTION."

Petitioners filed a timely appeal to the Court of Appeals for the Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291 (App A at 9a). The court affirmed, but on other grounds.

The Court of Appeals held that the "communication that occurs during psychoanalysis is entitled to constitutional protection" and "some speech interest may be implicated"

(App. A at 22a, 27a.) But "California's licensing scheme is content and viewpoint neutral; therefore it does not trigger strict scrutiny" (App. A at 24a), and -- for reasons not entirely clear -- it "passes First Amendment scrutiny" for content-neutral laws without any evidence being submitted. (App. A at 21a.) No evidence was before the court because it was reviewing a judgment of dismissal pursuant to Fed. R. Civ. Proc. 12(b)(6).

The court did not find that the licensing scheme is beneficial, reasonable, or narrowly tailored. Petitioners had argued that a court must find that for the laws to pass the intermediate First Amendment scrutiny applicable to content-neutral restraints on protected speech. (Appellants' Op. Br. at 30-31.) Respondents' brief did not dispute that, or argue that the scheme is narrowly tailored.

The Court of Appeals held that the scheme is "content and viewpoint neutral" because:

- "Nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods or prevents unlicensed people from engaging in psychoanalysis if no fee is charged"; and
- "It was adopted for the important purpose of protecting 'public health, safety, and welfare.'"

(App. A at 24a, 26a.) Respondents' brief never even argued that the laws were content-neutral.

The court rejected petitioners' argument that the laws were content and viewpoint based because, among other reasons, they restrain only speech with psychological content and they favor non-psychoanalytic viewpoints by offering a

license based on training in them but not based on training in psychoanalysis.

The court also rejected petitioners' contention that the licensing scheme is an unconstitutional prior restraint on pure speech.

Petitioners filed a petition for rehearing and suggestion for rehearing en banc, which the Court of Appeals denied.

REASONS FOR GRANTING THE WRIT

A. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE SUPREME COURT

What standard of First Amendment scrutiny applies to California's licensing scheme for psychoanalysts: Intermediate scrutiny? Strict scrutiny? The standards for prior restraints? The Court of Appeals' answers to these questions are all wrong, and squarely conflict with Supreme Court precedent.

First, the court purported to apply the standard of First Amendment scrutiny for content-neutral restraints on protected speech, which is intermediate scrutiny. But it failed to require proof that the laws are reasonable and narrowly tailored. That is the heart of intermediate scrutiny. That alone requires reversal of the judgment and remand of the case for trial or summary judgment proceedings on whether the laws' restraints on petitioners' practice of psychoanalysis are, in fact, reasonable and narrowly tailored.

Second, the court should have applied strict scrutiny, because laws that promote "wise counseling" by requiring psychoanalysts to be indoctrinated in State-approved views on

cognitive and behavioral counseling are patently content and viewpoint based.

Third, the laws require a license to charge a fee for constitutionally protected expression, condition the license on prior government examination of speakers' thoughts, and impose obstacles to licensure that require years to overcome. That is a presumptively unconstitutional prior restraint on pure speech subject to the highest standards of First Amendment scrutiny.

1. The "First Amendment scrutiny" applied by the court below erroneously failed to impose a burden of proof on respondents.

The Court of Appeals plainly erred in holding, on review of a judgment of dismissal pursuant to Fed. R. Civ. Proc. 12(b)(6), that "California's licensing scheme passes First Amendment scrutiny." It cannot pass First Amendment scrutiny without a finding that it is beneficial, reasonable, and narrowly tailored.

United States v. Treasury Employees, 513 U.S. 454 (1995), is a recent case on point. The Court invalidated a content-neutral law prohibiting government employees from charging a fee for speeches. On review of summary judgment for the employees, the Court held that "the Government has failed to show how it serves the interests it asserts by applying the honoraria ban" and "has not persuaded us that [the ban] is a reasonable response to the posited harms." 513 U.S. at 471, 476. The Court stated:

> "'[W]hen the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply

> "posit the existence of the disease sought to be cured." . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.'" 513 U.S. at 475.

Hill v. Colorado, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), is a recent case on point involving counseling. The Court applied First Amendment scrutiny to a content-neutral law restricting counseling and other speech near health facilities. It upheld the statute only after finding, based on evidence submitted on summary judgment, that the statute is "reasonable and narrowly tailored." 120 S. Ct. at 2486, 2494-97. See also Madsen v. Women's Health Center, Inc., 512 U.S. 753, 768 (1994) (invalidating parts of an injunction imposing content-neutral restraints on counseling and other speech after "examin[ing] each contested provision of the injunction to see if it burdens more speech than necessary to accomplish its goal"); 512 U.S. at 781 (Stevens, J., concurring in part and dissenting in part) ("the First Amendment protects the speaker's right to offer 'sidewalk counseling'").

The Court of Appeals' ruling is squarely inconsistent with Supreme Court precedent imposing a heavy burden of proof for a content-neutral restraint on speech to pass First Amendment scrutiny. See also United States v. O'Brien, 391 U.S. 367, 377 (1968) (content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential"); Turner Broadcasting System v. FCC, 512 U.S. 622, 662 (1994) ("Narrow tailoring in th[e]

context" of "content-neutral restrictions that impose an incidental burden on speech" requires "that the means chosen do not 'burden substantially more speech than is necessary to further the government's legitimate interests'").

This is not a case, if such a case is possible, where the State can satisfy its burden of proof by relying merely on the complaint and the face of the statutes. The complaint alleges that the licensing laws "are not narrowly tailored" "to protect the public from the unqualified practice of psychoanalysis" and have "neither directly nor substantially achieved" that goal (ER-58; "ER" refers to Appellants' Excerpts of Record filed in the Court of Appeals). It includes specific allegations of the scheme's unreasonableness. For example, petitioners allege that in 1998 State officials overseeing the research psychoanalyst program concluded that it could be abolished with no threat to consumers' health and safety. (App. E at 76a-78a.) That is, the State officials concluded that psychoanalysts could practice safely without any State regulation whatsoever.

The face of the statutes include odd exceptions that cast serious doubt on the government's purported "public health" justification for its licensing scheme:

- The laws exempt anyone who does not charge a fee. Pubic health dangers are the same whether or not a fee is charged. Licensing laws for risky activities such as surgery, engineering, and legal representation in court apply regardless of whether a fee is charged, because the risks are not in the fee but in the activity.
- The laws exempt licensees of other professions, including lawyers and optometrists, regardless of whether they have

mental health training (see Cal. Bus. & Prof. Code §2908; App. D at 57a-58a.)

- The laws exempt "research psychoanalysts" *if* they limit their fee-based practice to one-third of their time, and perform research or teaching in any other field two-thirds of their time (App. D at 68a-69a.) Such gerrymandering makes no sense.

These exemptions suggest that the restrictions on psychoanalysts are not a genuine and tailored response to true public health threats. Cf. United States v. Treasury Employees, 513 U.S. 454, 473 (1995) (statutory exceptions to prohibition on fees for government employee speeches "cast serious doubt" on government's purported justification). Rather, they seem tailored merely to hobble professional competition.

The Court of Appeals clearly erred in failing to remand this case to the trial court for summary judgment or trial on whether California's scheme for licensing psychoanalysts is reasonable, beneficial, and narrowly tailored.

2. Laws that regulate "wise counseling" by examining people's thoughts are not "content and viewpoint neutral."

The Court of Appeals held "that California's licensing scheme is content and viewpoint neutral; therefore it does not trigger strict scrutiny," because:

(a) "Nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods or prevents unlicensed people from engaging in psychoanalysis if no fee is charged"; and

(b) "The licensing scheme . . . was not adopted because of any disagreement with psychoanalytical theories. . . . It was adopted for the important purpose of protecting 'public health, safety, and welfare.'"
(App. A at 24a, 26a.) That is nonsense. Those factors are not even relevant to determining content and viewpoint neutrality.

The most relevant factors established by Supreme Court precedent are whether:
(a) "'the statutory language makes no reference to the content of the speech'"; and
(b) the statute "is justified without reference to the content of regulated speech."
Hill v. Colorado, 120 S. Ct. at 2491. See also Turner Broadcasting System v. FCC, 512 U.S. 622, 643 (1994) ("As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based").

Under those factors, California's licensing scheme is content-based. It expressly refers to the content of regulated speech ("psychoanalysis" and "psychotherapy") and justifies the regulations by a concern that the content of the speech may not be "wise." Therefore, California's licensing scheme is subject to strict scrutiny.

a) The Court of Appeals' factors are not even relevant to determining content and viewpoint neutrality.

First, the Court of Appeals relied on the fact that licensed therapists may provide psychoanalysis for a fee. But petitioners are not licensed, and are challenging the laws' restraints on them. "'It hardly answers one person's objection to a restriction on his speech that another person's,

outside his control, may speak for him.'" Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987), *quoting* Regan v. Taxation with Representation of Washington, 461 U.S. 540, 553 (1983). See also Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757, n. 15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means"). Moreover, as a practical matter licensed therapists are unable to provide psychoanalysis because they get no training in it in their programs leading to licensure.

Second, the Court of Appeals relied on the fact that these laws only ban the charging of a fee for psychoanalysis without a license. But a ban on fees is a substantial restraint on petitioners' speech. It "also imposes a significant burden on the public's right to . . . hear what the [petitioners] would otherwise have . . . said," and it generally "imposes the kind of burden that abridges speech under the First Amendment." United States v. Treasury Employees, 513 U.S. 454, 470 (1995).

A ban on fees is content based "if it imposes a financial burden on speakers because of the content of their speech." Simon & Schuster v. Crime Victims Bd., 502 U.S. 105, 115 (1991) ("Son of Sam" law, which restricts criminal's receipt of income from books on his or her crime, is content-based law that violates First Amendment); Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230-31 (1987) (law taxing magazines on subjects other than religion and sports is content-based).

"Speech cannot be financially burdened, any more than it can be punished or banned. . . . " Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 134-35

(1992). "It is too late to suggest 'that the dependence of a communication on the expenditure of money itself operates to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.'" First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 n. 23 (1978). "[T]he pamphlets of Thomas Paine were not distributed free of charge * * *. Freedom of speech * * * [is] available to all, not merely to those who can pay their own way." Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

Third, the Court of Appeals relied on the fact that mental health is an "important" purpose, and perhaps also the fact that the statutes do not express overt disagreement with psychoanalytical theories.

The importance of the State's purpose is irrelevant to whether laws are content and viewpoint neutral, as is the absence of express legislative disagreement with psychoanalytical theories. In Simon & Schuster, the Court found the law at issue content-based and unconstitutional despite the absence of a legislative intent to suppress certain ideas and the importance of the legislative purpose. 502 U.S. at 117 ("Simon & Schuster need adduce 'no evidence of an improper censorial motive'"; "' . . . even regulation aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment'"). See also Riley v. National Federation of the Blind, 487 U.S. 781, 791 (1988) ("the government, *even with the purest of motives*, may not substitute its judgment as to how best to speak for that of speakers and listeners"; emphasis added); United States v. O'Brien, 391 U.S. 367, 383 (1968) ("the purpose of Congress, as O'Brien uses that term, is not a basis for declaring this legislation unconstitutional. . . . [T]his Court will not strike down an otherwise constitutional statute on the

basis of an alleged illicit legislative motive [to suppress speech]").

b) Under relevant factors the restraints on psychoanalysis are content-based.

The licensing laws' terms and justification refer to the content of speech, and that makes the laws content- based.

California's licensing scheme refers to the content of regulated speech in that it refers to "psychoanalysis" by name. It generally refers to and restricts all psychotherapy and counseling. And it specifically restricts counseling intended to "modify feelings, conditions, attitudes and behavior," or "wherein interpersonal relationships are examined for the purpose of achieving more adequate, satisfying, and productive marriage and family adjustments," or providing "explanations and interpretations of the psychosexual and psychosocial aspects of relationships." (Cal. Bus. & Prof. Code §§ 2902(c), 2903, 4980, 4980.02; App. D at 56a-57a, 60a-61a, 65a-66a.)

California justifies the scheme by a desire "to regulate the provision of 'wise, competent, caring, compassionate, and effective counseling'" (App. A at 19a; Cal. Bus. & Prof. Code § 4980(a).) The State is essentially concerned that psychoanalysts might say an "unwise" thing, or fail to say the "wise" thing, causing clients to get bad ideas that adversely impact their mental health. But the government "may not interfere [with expressions of First Amendment freedoms] on the ground that [it] view[s] a particular expression as 'unwise' . . . " Riley v. National Federation of the Blind, 487 U.S. 781, 791 (1988) (internal quotation marks omitted), *quoting* Tashjian v. Republican Party of Connecticut, 479 U.S. 208, 224 (1987).

And the government may not regulate the direct psychological impact of ideas. Such regulations are content-based restrictions on speech subject to strict scrutiny. See Reno v. ACLU, 521 U.S. 844, 868 (1997):

> "[T]he purpose of the CDA [Communications Decency Act] is to protect children from the primary effects of 'indecent' and 'patently offensive' speech, rather than any 'secondary' effect of such speech. Thus, the CDA is a content-based blanket restriction on speech. . . . See also Boos v. Barry, 485 U.S. 312, 321 (1988) ('Regulations that focus on the direct impact of speech on its audience' are not properly analyzed under Renton); Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992) ('Listeners' reaction to speech is not a content-neutral basis for regulation')."

In Boos v. Barry, 485 U.S. 312, 321, 334 (1988), a majority of the Court held that a law regulating speech due to its potential psychological and emotive impact is content-based. The law at issue regulated the display of signs near foreign embassies that defamed foreign governments. It was justified by a desire to prevent the psychological impact of such signs. The Court subjected it to strict scrutiny and invalidated it. The Court held:

> * * * Listeners' reactions to speech are not the type of 'secondary effects' we referred to in Renton. To take an example factually close to Renton, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as

> a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.
>
> . . . The emotive impact of speech on its audience is not a 'secondary effect.' Because the display clause regulates speech due to its potential primary impact, we conclude that it must be content-based.

485 U.S. at 321 (O'Connor, J., with whom Justices Stevens and Scalia joined; emphasis added) and at 334 (Brennan, J., with whom Justice Marshall joined, concurring in pertinent part and concurring in the judgment) ("I join all but Part II-A of Justice O'Connor's opinion. I also join Part II-A [quoted above] to the extent it concludes that even under the [Renton] analysis * * * the display clause constitutes a content-based restriction on speech that merits strict scrutiny. Whatever 'secondary effects' means, I agree that it cannot include listeners' reactions to speech"). See also Simon & Schuster v. Crime Victims Bd., 502 U.S. at 118 ("The Board disclaims, as it must, any state interest in suppressing descriptions of crime out of solicitude for the sensibilities of readers").

In addition, the licensing scheme is also viewpoint based. By specifying the content of the education and examinations necessary for a license, it favors those viewpoints over others that do not lead to licensure. As a practical matter, it greatly favors the viewpoints of short-term cognitive and behavioral counseling over those of psychoanalysis. "[P]sychoanalytic training . . . is not taught

in the graduate programs for any of th[e] degrees" that lead to licensure, and psychoanalytic institutes do not "attempt to teach students the subject areas on the written or oral examinations required by the Board [of Psychology]" (ER-51, ER-52).

The chart below contrasts required courses at the National Psychological Association for Psychoanalysis ("NPAP"), from which petitioner Sowers graduated, with the content of the Psychology Board's examinations (which is similar to the content of the psychology graduate programs) (ER-51, 54):

NPAP Required Courses	Psychology Board exam
Writings of Sigmund Freud; Psychoanalytic Theory of Human Development and of Psychopathology; Dream Interpretation; Analysis of Resistance; Analysis of Transference; Psychoanalytic Technique; History of Psychoanalytic Thought	Assessment and Diagnosis, with Psychometrics; Biological Bases of Behavior; Cognitive-Affective Bases of Behavior; Ethical/Legal/ Professional Issues; Growth and Lifespan Development; Research Methods; Social and Multicultural Bases of Behavior; Treatment/Intervention

The education at the Jungian institutes from which petitioners Monte and Corbett graduated is equally distinct from that required for a license. General areas of training at the C.G.

Jung Institute of Chicago include: Jungian Understanding of Personality and Psychopathology; The Practice of Jungian Analysis; Techniques for the Activation and Interpretation of the Unconscious, including Dream theory and interpretation; and Archetypal Material, including Mythology, Fairy tales and folklore, and Comparative religion (ER-51).

Of course, it is true that by this reasoning all licensing laws that require certain education and examinations are viewpoint-based. But none of the familiar licensing laws are restraints on pure speech, or on a primarily expressive activity. Psychoanalysis is pure speech. Licensing laws restricting who may perform surgery, design bridges, or represent clients as officers of the court are viewpoint-based, but they are not restraints on pure speech, or even on activities that are primarily expressive. So they are not subject to heightened First Amendment scrutiny.

If States were to impose general licensing laws with substantive education requirements on professions that consist purely or primarily of speech or expression, those laws would be content-based restraints on speech and should be subject to heightened First Amendment scrutiny. This is especially true where the value of the regulated speech lies in the content of the ideas expressed, and the purpose of the regulation is to control the cognitive and emotive impact of those ideas on listeners.

For example, laws purporting to impose such a licensing scheme on professional musicians, poets, playwrights, private teachers, journalists, filmmakers, and fundraisers should be subject to strict scrutiny. Cf. Riley v. National Federation of the Blind, 487 U.S. 781 (1988) (licensing scheme for fundraisers is unconstitutional content-based prior restraint on speech, although scheme did not

require education and examinations); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (licensing scheme for film distributors is unconstitutional content-based prior restraint on speech where examination of film's content is required); N.J.-Phila. Presbytery v. N.J. State Bd. of Ed., 482 F. Supp. 968, 976 (D. NJ 1980) (enjoining State from enforcing licensing law against private college and teachers because "unless the Court acts, . . . the College, its teachers and its church sponsors will be forbidden to teach, an appalling infringement of the rights of free speech"), aff'd 654 F.2d 868 (3rd Cir 1981).

In contrast, the rationale and holding of the Court of Appeals' Opinion make it simple for a government to impose severe financial burdens on any professional speech and expression. It would allow governments to prohibit journalists, novelists, filmmakers, and musicians from charging a fee unless they submit to years of indoctrination in State-approved ideas on "wise, competent, [and] caring" journalism, novel writing, filmmaking, or musicianship. Under the Court of Appeal's holding, the State could justify laws prohibiting rock, grunge, and rap musicians from charging a fee for their music until they obtained a Ph.D., passed examinations, and served two years of supervised experience in classical music. Those laws could be premised on a purported purpose to safeguard the "public health." The State can always claim that laws regulating expression are primarily directed at its psychological impact, which is always important to "public health."

The Court of Appeals' decision that the licensing scheme is content and viewpoint neutral is simply wrong, and is squarely inconsistent with Supreme Court precedent.

3. Prior restraints on pure speech are presumptively unconstitutional.

The Court of Appeals held that the "licensing laws are not a prior restraint on speech . . . [b]ecause this is a valid licensing scheme designed to protect the mental health of Californians . . . [and] the state is [not] revoking or denying licenses 'for arbitrary or constitutionally suspect reasons.'"

First, contrary to the court's holding, this has not been proven to be a valid licensing scheme under any level of heightened First Amendment scrutiny, for the reasons stated above.

Second, regardless of the court's other holdings, this holding conflicts with Supreme Court precedent. "Generally, speakers need not obtain a license to speak." Riley v. National Federation of the Blind, 487 U.S. 781, 802 (1988). While a State may impose a licensing requirement as a valid time, place, or manner restriction, "such a regulation must provide that the licensor 'will, within a specified brief period, either issue a license or go to court.'" Id., *quoting* Freedman v. Maryland, 380 U.S. 51, 59 (1965). That requirement is not met here, and the Court of Appeals did not hold otherwise. The licensing scheme's educational, examination, and supervised experience requirements permit delays without limit. Under these circumstances, the licensing provision is a presumptively unconstitutional prior restraint on pure speech. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" and must "assure[] an almost immediate judicial determination of the validity of the restraint").

Moreover, the education and examination requirements are essentially an examination by the government of speakers' thoughts as a condition to allowing them to speak. It is a prior restraint designed to impose content-based censorship, and as such is presumptively unconstitutional. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952) ("New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and pictures sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned").

B. THE QUESTIONS PRESENTED ARE IMPORTANT.

Wise counseling and mental health are unquestionably important, but no more so than First Amendment rights. Constitutionally protected expression has "transcendent value to all society." Bigelow v. Virginia, 421 U.S. 809, 816 (1975).

Whether the government has a right to force people to undergo indoctrination in various subjects and viewpoints before they may discuss personal and emotional issues with willing listeners in the privacy of their homes and offices is a critically important issue. Many holdings of this Court suggest that it does not. "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." Stanley v. Georgia, 394 U.S. 557, 565 (1969).

> 'The very purpose of the First Amendment is to foreclose public authority from assuming a

> guardianship of the public mind through regulating the press, speech, and religion.' Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). To this end, the government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners * * *.

Riley v. National Federation of the Blind, 487 U.S. at 791.

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95 (1972). See also Turner Broadcasting System v. FCC, 512 U.S. 622, 641 (1994) (citations omitted) ("At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence").

The practical impact of these licensing laws on psychoanalytic thought and practice is devastating. Psychoanalysis is being driven from the marketplace. These licensing laws clearly favor contrary theories of comparatively brief, superficial, inexpensive, and highly directive counseling.

The Court of Appeals states, without any support, that the licensing scheme "was not adopted because of any disagreement with psychoanalytical theories." But psychoanalytic theories by their nature focus on ideas that all people disagree with so violently that they strongly repress them, such as certain sexual and aggressive wishes. Psychoanalytic theories also focus on a spiritual dimension

reflected in myths, fairy tales and religions, that is highly controversial and evokes much disagreement. (ER-144, ER-145). And the entities that pay for much of the public's mental health services--governments and insurance companies--are biased against psychoanalysis simply because it is more expensive than counseling (ER-151) (see generally, App. E. at 81a-83a.) There are many reasons to be skeptical about the court's statement that the scheme was not enacted due to *any* disagreement with psychoanalytical theories.

More important, however, than speculation on the motives behind this licensing scheme is acknowledgement of its potential for abuse and for sharply limiting the marketplace in therapeutic ideas and expression. "[T]he vice of content-based legislation in this context is that 'it lends itself' to being 'used for invidious thought-control purposes.'" Hill v. Colorado, 120 S. Ct. at 2493.

> " . . . Laws of this sort pose the inherent risk that the government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion. These restrictions 'raise the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"

Turner Broadcasting System v. FCC, 512 U.S. 622, 641 (1994) (citation omitted).

California's licensing scheme is pervasive and strongly lends itself to being used for invidious thought-control purposes. That potential raises a highly important First Amendment issue that this Court should review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Entered and Filed September 29, 2000]

No. 99-15243

D.C. No. CV 97-3913 WHO

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, a Delaware corporation; CEDRUS MONTE; ALLAN D. SOWERS; LIONEL CORBETT,
Plaintiffs-Appellants,

v.

CALIFORNIA BOARD OF PSYCHOLOGY, a state board (Board); BILL LOCKYER, California State Attorney General; STATE OF CALIFORNIA; THOMAS O'CONNOR, the Board's executive officer in his official capacity only; BRUCE EBERT; JUDITH JANARO FABIAN; LILLI FRIEDLAND; MARTIN GREENBERG; LINDA HEE; MARY McMILLAN; MARILYN PALAREA; MARY ELLEN EARLY; EMIL RODOLFA, PhD,
Defendants-Appellees.

Court of Appeals Opinion - 9/29/00

Appeal from the United States District Court
for the Northern District of California
William H. Orrick, District Judge, Presiding.

Argued and Submitted
April 13, 2000 - San Francisco, California

Filed September 29, 2000

Before: A. Wallace Tashima and Susan P. Graber,
Circuit Judges, and Robert J. Kelleher,*
Senior District Judge

Opinion by Judge Tashima.

TASHIMA, Circuit Judge:

Plaintiff psychoanalysts Lionel Corbett, Cedrus Monte, and Allan Sowers, and the National Association for the Advancement of Psychoanalysis ("NAAP") (collectively "plaintiffs") sued defendants, members of the California Board of Psychology ("Board"), and the Attorney General of California, for declaratory and injunctive relief under 42 U.S.C. § 1983. Plaintiffs allege that California's mental health licensing laws, which regulate the practice of psychology and other professions, restrict their First and Fourteenth Amendment rights. Specifically, they assert that

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* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

the licensing scheme prohibits them from practicing psychoanalysis in California. The district court held that plaintiffs failed to state a claim under Federal Rule of Civil Procedure 12(b)(6), and dismissed their complaint and the action. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Psychoanalysis and Psychology

"Psychoanalysis" is defined in *Stedman's Medical Dictionary* (25th ed. 1990) as:

> [A] method of psychotherapy, originated by Freud, designed to bring preconscious and unconscious material to consciousness primarily though the analysis of transference and resistance. . . . A method of investigating the human mind and psychological functioning, especially through free association and dream analysis in the psychoanalytic situation.

Id. at 1284; *see also American Medical Association Encyclopedia of Medicine* 831 (1989) ("The psychoanalyst is usually a doctor of medicine.").[1]

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[1] Plaintiffs allege that psychoanalysis:

> is a treatment based on verbal communication between the analyst and client. Its aim is to promote emotional growth through insight, character change, personal integration, and a

"Psychology" has been defined as:

> The scientific study of mental processes. Psychology deals with all internal aspects of the mind, such as memory, feelings, thought, and perception, as well as external manifestations, such as speech and behavior. It also addresses intelligence, learning and the development of personality. Methods employed in psychology include direct experiments, observations, surveys, study of personal histories, and special tests (such as intelligence tests and personality tests).

Id. at 832 (emphasis omitted). Psychology includes various approaches, including "psychoanalytic psychology," which

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> lessening of symptoms that originate in the client's mind or emotions. It is based on extensive scientific research into human behavior and inner experience. The term psychoanalyst identifies practitioners from various schools of thought including Adlerian, Existential, Eclectic, Ego-Psychology, Freudian, Jungian, Modern Freudian, Object Relations, and Self-Psychology.

Plaintiffs further claim that "[t]he association between the analyst and the analysand is deep, intimate, personal and lengthy. The analysand typically sees the analyst two to five hours a week for two to five years or more. . . . Strong emotional bonds develop between the analysand and analyst, and are an expected part of the therapeutic process."

"stresses the role of the unconscious and childhood experiences." *Id.*

B. Licensing Scheme

The profession of psychology has been regulated in California since 1958, when the Legislature enacted the Psychology Certification Act, Cal. Bus. & Prof. Code §§ 2900-2980 (1958), which "served only to protect the title 'psychologist,'" but did not define the practice of psychology. Executive Summary, California Board of Psychology, *Sunset Review Report*, at 1 (October 1, 1997) ("*Sunset Report*"). In 1967, the Legislature "recognized the actual and [**4] potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology" and enacted the Psychology Licensing Law, Cal. Bus. & Prof. Code §§ 2900-2996.6 (1968). *Sunset Report* at 1. That law includes a legislative finding that the "practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology." Cal. Bus. & Prof. Code § 2900.

The California Business and Professions Code defines a "psychologist" as a person so representing himself or herself "to the public by any title or description," including "psychoanalysis" and "psychoanalyst." Cal. Bus. & Prof. Code § 2902(c). The practice of psychology in California requires a license and is defined as rendering any psychological service to the public "for a fee." *Id.* § 2903 (stating that "no person may engage in the practice of psychology, or represent himself to be a psychologist, without a license" unless otherwise specified by statute).

To qualify for a license to practice psychology in California, an applicant must possess a doctorate, or a degree deemed equivalent, in psychology or a related field such as education psychology. *See id.* § 2914(b). An applicant must have at least two years of supervised professional experience under the direction of a licensed psychologist. *See id.* § 2914 (c). In addition, an applicant must pass the Board's examination, complete training in substance dependency, and fulfill course-work requirements in partner abuse and human sexuality. *See id.* § 2914 (d)-(f). Any violation of the laws regulating psychologists can be punished as a misdemeanor. Section 2529 of the Business and Professions Code, relating to research psychoanalysts, is the only part of the statute that specifically addresses the qualifications of psychoanalysts. Under § 2529, graduates of four, specific, California psychoanalytic institutes, or institutes deemed equivalent, "may engage in psychoanalysis as an adjunct to teaching, training, or research and hold themselves out to the public as psychoanalysts . . . ." *Id.* § 2529. Under the regulations, a research psychoanalyst may render psychoanalytic services for a fee for only a third (or less) of his or her professional time. *See* Cal. Code Regs. ("C.C.R."), tit. 16 § 1371. If they register with the state, students and graduates also "may engage in psychoanalysis under supervision, provided" that they do not imply in any way that they are licensed to practice psychology. Cal. Bus. & Prof. Code § 2529. "Physicians and surgeons, psychologists, clinical social workers, and marriage, family and child counselors, licensed in this state" need not register to engage in research psychoanalysis. *See* 16 C.C.R. § 1369.

The licensing laws do not prevent "qualified members of other recognized professional groups," including

physicians, clinical social workers, family and child counselors, attorneys and ordained members of recognized clergy, from doing work of a psychological nature consistent with the laws governing their respective professions, provided that they do not hold themselves out to the public as psychologists or use terms that imply they are licensed to practice psychology. Cal. Bus. & Prof. Code § 2908.

C. Plaintiffs

The NAAP is a membership association of professional psychoanalysts dedicated to encouraging the study of, and improving the practice of, psychoanalysis in the United States and other countries. Its membership includes more than 1,000 certified psychoanalysts and more than 400 psychoanalyst candidates-in-training. The NAAP alleges that it has lost income from membership dues as a result of California's licensing scheme. According to the complaint, the NAAP filed suit "on its own behalf, as a representative of its members whose practice of psychoanalysis in California allegedly has been unreasonably restricted by California law, and on behalf of California residents who are prevented from retaining those NAAP members for professional psychoanalysis."

Plaintiff Corbett is a physician licensed to practice in three states and England, but not in California, because he lacks a one-year medical residency in the United States or Canada. He has been certified as a Diplomate Jungian Analyst by the C.G. Jung Institute of Chicago, which does not award

a doctorate degree.[2] Dr. Corbett is currently a professor at the Pacifica Graduate Institute in Santa Barbara, California, where he trains psychology Ph.D. candidates in the theory and practice of psychoanalytic psychotherapy. He has held academic appointments in departments of psychiatry at four United States medical schools.

Plaintiff Monte, who lives in California, has a master's degree in psychology from California State University at Sonoma and a diploma in analytical psychology from the C.G. Jung Institute in Zurich, Switzerland. Monte undertook clinical training in psychoanalysis in Switzerland, where she paid her supervisors and saw clients at a different site from her supervisors. Monte has been ordained as a Diplomate Jungian Analyst by the Association for the Integration of the Whole Person, a religious organization chartered in California. Monte would be eligible for a psychology license in California only if she completed additional courses and acquired supervised professional experience.

Plaintiff Sowers holds a master's degree in divinity and a certificate in psychoanalysis from the National Psychological Association for Psychoanalysis in New York City. Sowers is certified as a pastoral counselor in the Presbyterian Church and certified as a psychoanalyst in the State of Vermont. He is a resident of New York, but intends to travel to California to establish a psychoanalytic practice.

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[2] The research psychoanalyst laws do not recognize the psychoanalytic institute from which he graduated as substantially equivalent to California institutes.

He wishes to hold himself out professionally to the public, using the title "psychoanalyst."

D. Procedural History

The district court dismissed plaintiffs' first amended complaint under Federal Rule of Civil Procedure 12(b)(1) because no plaintiff had properly alleged standing. Also, based on Eleventh Amendment immunity, the court dismissed with prejudice two defendants, the State of California and the Board. Plaintiffs were granted further leave to amend "to allege further facts" demonstrating standing. The district court thereafter dismissed the second amended complaint, ruling that plaintiffs lacked standing because the complaint was "conclusory" on standing issues. Plaintiffs, however, were granted leave to amend "one more time."

Plaintiffs then filed their third amended and supplemental complaint ("complaint"), which was dismissed with prejudice for failure to state a claim. The district court concluded that, although standing was adequately alleged, the complaint failed to state claims under the First or Fourteenth Amendment. Plaintiffs filed a timely notice of appeal.

II. JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction pursuant to 28 U.S.C. § 1291.

III. STANDARD OF REVIEW

We review de novo the district court's dismissal for

failure to state a claim pursuant to Rule 12(b)(6). *See Two Rivers v. Lewis,* 174 F.3d 987, 991 (9th Cir. 1999). We must "accept all factual allegations of the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Id.* "Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Halkin v. VeriFone, Inc. (In re VeriFone Sec. Litig.),* 11 F.3d 865, 868 (9th Cir. 1993). In determining whether plaintiffs can prove facts in support of their claim that would entitle them to relief, we may consider facts contained in documents attached to the complaint. *See Roth v. Garcia Marquez,* 942 F.2d 617, 625 n.1 (9th Cir. 1991) (citing *Durning v. First Boston Corp.,* 815 F.2d 1265, 1267 (9th Cir. 1987)).

IV. DISCUSSION

Plaintiffs allege that California's mental health licensing laws abridge their Fourteenth Amendment substantive due process and equal protection rights and their First Amendment rights of speech and association.[3] We affirm

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[3] Plaintiffs alleged right to travel and freedom of religion claims below, but on appeal made no arguments relating to them. Plaintiffs also do not challenge the Eleventh Amendment dismissal of the State and the Board. We deem all of these arguments waived. *See Smith v. Marsh,* 194 F.3d 1045, 1052 (9th Cir. 1999). There is some hint in plaintiffs' briefs of an overbreadth challenge; however, it is never explicitly argued, and thus is also waived. *See Retlaw Broad. Co. v. NLRB,* 53 F.3d 1002, 1005 n.1 (9th Cir. 1995) (holding that an issue is waived if the briefs fail to contain appellant's contentions, and citations to authorities, statutes, and the record).

the district court's dismissal because we hold that plaintiffs have failed to state any claim for constitutional relief.[4]

A. Fourteenth Amendment

To withstand Fourteenth Amendment scrutiny, a statute is required to bear only a rational relationship to a legitimate state interest, unless it makes a suspect classification or implicates a fundamental right. *See City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (equal protection); *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997), *cert. denied*, 119 S. Ct. 168 (1998) (substantive due process).

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[4] We agree with the district court that there is no problem of standing for either the individual plaintiffs or the NAAP, as an organization. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (holding that to satisfy constitutional standing, plaintiffs must show that: (1) they suffered an "injury in fact;" (2) the injury is fairly traceable to the challenged action of defendants; and (3) it is "likely," as opposed to "speculative," that the injury will be redressed by a favorable decision) (citations and internal quotation marks omitted); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (holding that an organization has standing to sue on behalf of its members where: (1) the individual members would otherwise have standing to sue on their own; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) the lawsuit does not require the participation of individual members).

1. Fundamental Right

Because psychoanalysts are not a suspect class entitled to heightened scrutiny, we must examine whether the licensing scheme implicates any fundamental right. We hold that it does not.

Plaintiffs contend that California's mental health licensing laws are subject to strict scrutiny under the Due Process Clause of the Fourteenth Amendment because they implicate the fundamental rights associated with the close-knit relationships between analysts and analysands. It is true that the Fourteenth Amendment protects some personal relationships, such as "those that attend the creation and sustenance of a family" and other "highly personal relationships." *IDK, Inc. v. Clark County,* 836 F.2d 1185, 1193 (9th Cir. 1988) (internal quotation marks and citation omitted).

At the other end of the relationship spectrum, we have held that the relationship between an escort and a client paying for escort services is not an intimate association implicating substantive due process rights. *See id.* Although we do not imply that the relationship between a client and an escort is similar in nature to the relationship between a patient and a psychoanalyst, we do find some of our analysis in *IDK* to be instructive. The relationship between a client and a psychoanalyst lasts "only as long as the client is willing to pay the fee." *Id.* Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these relationships simply do not rise to the level of a fundamental right. *See Zablocki v. Redhail,* 434 U.S. 374, 383-86 (1978) (right to marry); *Moore v. City of East*

Cleveland, 431 U.S. 494, 503-06 (1977) (right to live with family); *Griswold v. Connecticut*, 381 U.S. 479, 482-86 (1965) (right to marital privacy); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (right of parents to direct children's upbringing and education). "These are not the ties that 'have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.'" *IDK*, 836 F.2d at 1193 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984)).

We further conclude that substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider. The Seventh Circuit has noted that "most federal courts have held that a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider." *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir. 1993) (citations omitted). We agree, and hold that there is no fundamental right to choose a mental health professional with specific training.

2. Rational Basis

Because we conclude that the licensing scheme neither utilizes a suspect classification nor implicates a fundamental right, we now examine whether it is "rationally related to a legitimate state interest." *Dukes*, 427 U.S. at 303. In applying the rational basis test, we presume the constitutionality of the classification. *See id.* "[T]hose challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental

decisionmaker." *Vance v. Bradley,* 440 U.S. 93, 111 (1979); *see also Williamson v. Lee Optical,* 348 U.S. 483, 488 (1955) (holding under a Fifth Amendment due process analysis that a statute should be upheld if "it might be thought that the particular legislative measure was a rational way to correct" a problem). "We do not require that the government's action actually advance its stated purposes, but merely look to see whether the government *could* have had a legitimate reason for acting as it did." *Dittman v. California,* 191 F.3d 1020, 1031 (9th Cir. 1999) (quoting *Halverson v. Skagit County,* 42 F.3d 1257, 1262 (9th Cir. 1995) (citation and internal quotation marks omitted)), *cert. denied,* 120 S. Ct. 2717 (2000). We need only determine whether the licensing scheme has a "conceivable basis" on which it might survive rational basis scrutiny. *Id.* (quoting *Lupert v. California State Bar,* 761 F.2d 1325, 1328 (9th Cir. 1985)).

Plaintiffs advance numerous arguments about why the licensing scheme should fail rational basis review. Primarily, they contend that: (a) there is no rational basis for requiring professionals who already are trained in psychoanalysis to obtain additional training in order to qualify for a license; (b) the licensing scheme irrationally exempts research psychoanalysts from its requirements; (c) the licensing scheme is irrational because it is unnecessary and ineffective; and (d) the licensing scheme is irrational because it is more stringent than similar schemes regulating other counseling professions. We do not find any of those arguments persuasive and conclude that the licensing scheme is rationally related to California's interest in protecting the mental health and safety of its citizens.

First, plaintiffs argue that there is no rational basis for requiring professionals already trained in psychoanalysis to have certain other training in order to obtain a license. Because the *Lochner*[5] era has long passed, this argument must fail. *See Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996) (stating that *Lochner* "symbolizes an era in which the Court, invalidating economic legislation, engaged in a level of judicial activism which was unprecedented in its time and unmatched since"). As the Supreme Court stated in *Williamson*:

> It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.

348 U.S. at 488 (citation omitted).

This case is nearly identical to *Maguire v. Thompson*, 957 F.2d 374 (7th Cir. 1992), in which the Seventh Circuit held that the Illinois General Assembly had a rational basis for requiring certain training for health care professionals to obtain a medical license, even though naprapaths, who treat

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[5] *Lochner v. New York*, 198 U.S. 45 (1905).

human ailments through manipulation of tissue, were excluded from practicing. The *Maguire* court observed that:

> [T]he General Assembly could have concluded that [certain] levels of education provide[ ] better training in theories of disease. Logically, better training leads to better diagnosis and better treatment. . . . It is within the legislative prerogative to limit the practice of medicine to those who provide the safest service.
>
> . . . It would even be rational for a legislature to conclude that the training offered in a school of naprapathy would in fact be inadequate for proper medical diagnosis and treatment and therefore people seeking treatment from those who hold only a degree in naprapathy run a serious risk of either misdiagnosis or non-diagnosis of their ailment.

Id. at 377-78 (citation omitted). The Seventh Circuit again utilized the reasoning of *Maguire* in holding that the Illinois legislature could regulate acupuncture by requiring a degree from a chiropractic school. *See Mitchell,* 995 F.2d at 774-76. We agree with the reasoning of these cases.

Based on the health and welfare of its citizens, California certainly has a "conceivable rational basis" for regulating the licensing of psychologists, and therefore, psychoanalysts. *Dittman,* 191 F.3d at 1031. According to the Supreme Court, "health . . . includes psychological as well as physical well-being." *United States v. Vuitch,* 402 U.S. 62,

72 (1971). The California Legislature first regulated psychology because it "recognized the actual and potential consumer harm that can result from the unlicensed, unqualified or incompetent practice of psychology. " *Sunset Report* at 1. The Psychology Licensing Law includes a legislative finding that the "practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology." Cal. Bus. & Prof. Code § 2900. Plaintiffs Monte and Corbett even concede in their declarations that psychoanalytic methods cannot effectively be used to treat people with major mental illness. According to Dr. Corbett, the adverse effects of incompetent psychotherapy could include sexual activity between a client and therapist, deteriorating mental health, family, job, and relationships of the patient, and even suicide. Regulating psychology, and through it psychoanalysis, is rational because it is within the state's police power to regulate mental health treatment. *See Maguire,* 957 F.2d at 377.

Next, plaintiffs assert that the licensing scheme is irrational because it exempts research psychoanalysts from its requirements. As the district court noted, the exemption for research psychoanalyst is valid because it is not unusual or irrational to provide exemptions in a licensure statute. *See* Cal. Bus. & Prof. Code § 2529 (allowing the practice of psychoanalysis "as an adjunct to teaching, training or research"). The licensing scheme also contains exemptions for employees of schools and governmental agencies, psychologists licensed in other jurisdictions, and graduate students. *See id.* §§ 2909-12. Certainly it is rational for the Legislature to allow academics to engage in psychoanalysis on

a limited basis to enhance teaching and research. Further, it is not improper for the Legislature to single out research psychoanalysts. The Supreme Court has held that a state legislature addressing health and safety reform "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson,* 348 U.S. at 489 (citations omitted). The California Legislature enacted a certification law regulating psychology in the 1950s, substituted a licensing scheme in the 1960s, and enacted a limited exception for academic research psychoanalysis in the 1970s.

Plaintiffs argue additionally that the licensing scheme is not rationally related to a legitimate state interest because it is ineffective and unnecessary. In support of their argument, they observe that a committee had recommended to the California Medical Board that the laws regulating psychoanalysts were unnecessary and ineffective. As additional evidence that the scheme is unnecessary, plaintiffs point to the facts that research psychoanalysts are allowed to practice without meeting all of the requirements of the licensing scheme and that, in four years, only one complaint has been filed against a research psychoanalyst. Research psychoanalysts, however, are a small and discrete group. That they appear to be able to practice satisfactorily without having met all licensing requirements does not compel the Legislature to infer that *all* psychoanalysts could practice satisfactorily without having met the educational and experience requirements of the licensing scheme. We thus perceive no legal basis for interfering with the Legislature's judgment regarding the training needed for mental health professionals.

Plaintiffs next argue that the psychology licensing laws have no rational basis because the California licensing schemes for other, similar counseling professions are less stringent. Plaintiffs highlight the differences between the licensing schemes for family counselors and social workers, as opposed to psychologists, in an attempt to show that the exclusion of psychoanalysts is irrational, when other professionals are permitted to engage in counseling. *See* Cal. Bus. & Prof. Code §§ 4996, 4996.12, 4980, 4980.02. To qualify for a license, a social worker must have a master's degree from an accredited school of social work, two years of supervised experience, and chemical dependency training. *See id.* § 4996.2. For licensure, a marriage, family, and child counselor must have a master's or doctorate degree from an accredited school, certain course work, a supervised clinical placement, and two years of supervised experience. *See id.* § 4980.40. The stated purpose of the marriage and family therapy law is to regulate the provision of "wise, competent, caring, compassionate, and effective counseling in order to enable [people] to improve and maintain healthy family relationships. Healthy individuals and healthy families and healthy relationships are inherently beneficial and crucial to a healthy society, and are our most precious and valuable natural resource." *See id.* § 4980(a). The question is not whether we would choose to implement the same scheme, but whether it was rational for the California Legislature to implement different licensing schemes for psychologists, and for social workers and family counselors. It is not irrational for the Legislature to progress one step, or one profession, at a time. *See Williamson,* 348 U.S. at 489.

Finally, plaintiffs attack the psychologist licensing scheme on several other grounds, all of which we reject.

They suggest that the scheme is irrational because other states, such as Vermont, Washington and Colorado, have less restrictive licensing schemes for psychoanalysts. This does not mean, however, that it is irrational for California to have its existing scheme. It simply is not the function of the courts to tell California how to craft its legislation.

Plaintiffs also argue that there is no rational basis for the Legislature to require two years of supervised on-site training and to credit only non-paid supervision for psychologists. *See* 16 C.C.R. § 1387(r). Plaintiffs claim that psychoanalysts practice at sites separate from their supervisors' locations and sometimes pay for this supervision. *See* 16 C.C.R. § 1387. Specifically, Dr. Corbett paid for her supervision in England. It is certainly rational, however, for the Legislature to require on-site supervision for the training of mental health professionals. *See Maguire,* 957 F.2d at 377 (holding that it is rational for a legislature to require certain levels of education for health care professionals). It is also rational to be suspicious of paid-for supervision.

We conclude that the psychologist licensing scheme is rationally related to legitimate government interests; therefore, the district court properly dismissed plaintiffs' Fourteenth Amendment claims.

B. First Amendment

Plaintiffs further contend that California's psychologist licensing laws violate their First Amendment rights to

freedom of speech.[6] The First Amendment applies to state laws and regulations through the Due Process Clause of the Fourteenth Amendment. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 489 (1996). We conclude that, even if a speech interest is implicated, California's licensing scheme passes First Amendment scrutiny.

1. Extent to Which Speech is Implicated

The Supreme Court has held that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949); *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (holding that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity").

Plaintiffs contend that, because psychoanalysis is the "talking cure," it deserves special First Amendment protection because it is "pure speech." As the district court noted, however, "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech . . . . That psychoanalysts employ speech to treat their clients

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[6] Our discussion of highly personal relationships under Fourteenth Amendment substantive due process, *see* Part IV.A.1, *supra*, also disposes of plaintiffs' freedom of association claims under the First Amendment. *See IDK,* 836 F.2d at 1192-96.

does not entitle them, or their profession, to special First Amendment protection."[7] The Supreme Court has noted that "[w]hile it is possible to find some kernel of expression in almost every activity a person undertakes . . . such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin,* 490 U.S. 19, 25 (1989), *quoted in Las Vegas Nightlife, Inc. v. Clark County,* 38 F.3d 1100, 1102 (9th Cir. 1994). The communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation. *See IDK,* 836 F.2d at 1191 (noting that simply because speech may be implicated, an activity is not "excluded from the safeguards of the first amendment").

The Supreme Court noted that an attorney's in-person solicitation of clients is "entitled to some constitutional protection," but "is subject to regulation in furtherance of important state interests." *Ohralik,* 436 U.S. at 459. The *Ohralik* Court also noted "numerous" examples of communications "that are regulated without offending the First Amendment." *Id.* at 456 (highlighting the exchange of

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[7] This discussion relates as well to plaintiffs' claim that the First Amendment extends to the rights of clients to receive information from their psychoanalysts. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n.5 (9th Cir. 1998) (acknowledging "the well-established rule that the right to receive information is an inherent corollary of the rights of free speech and press, because the right to distribute information necessarily protects the right to receive it . . . the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom") (internal quotation marks and citation omitted).

securities information, corporate proxy statements, exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees). The Supreme Court held that the regulation of solicitation within the legal profession "falls within the State's proper sphere of economic and professional regulation." *Id.* at 459.

It is properly within the state's police power to regulate and license professions, especially when public health concerns are affected. *See Watson v. Maryland,* 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."). Justice Jackson eloquently summarized the state's interest in licensing certain professions:

> The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public from the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system.

Thomas v. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring). Given the health and safety implications, California's interest in regulating mental health is even more

compelling than a state's interest in regulating in-person solicitation by attorneys. We conclude that the licensing scheme is a valid exercise of California's police power.

2. Content and Viewpoint Neutrality

We further conclude that California's licensing scheme is content and viewpoint neutral; therefore, it does not trigger strict scrutiny. We have held that "'the appropriate level of scrutiny is tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content.'" *Black v. Arthur,* 201 F.3d 1120, 1123 (9th Cir. 2000) (quoting *Foti v. City of Menlo Park,* 146 F.3d 629, 635 (9th Cir. 1998)). "The 'principal inquiry' in determining whether a regulation is content-neutral or content-based 'is whether the government has adopted [the] regulation . . . because of [agreement or] disagreement with the message it conveys.'" *Crawford v. Lungren,* 96 F.3d 380, 384 (9th Cir. 1996) (quoting *Turner Broad. Sys., Inc. v. FCC,* 512 U.S. 622, 641 (1994)).

California's mental health licensing laws are content-neutral; they do not dictate what can be said between psychologists and patients during treatment. Nothing in the statutes prevents licensed therapists from utilizing psychoanalytical methods or prevents unlicensed people from engaging in psychoanalysis if no fee is charged.[8] This

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[8] We agree with the district court that the statutory scheme does not prevent plaintiffs from engaging in psychoanalysis if they do not charge a fee. Under the "psychologists" licensing law, the practice of psychology explicitly includes charging a fee. *See* Cal. Bus. & Prof. Code § 2903. Under the "medicine" licensing law,

reasoning mirrors Justice Jackson's concurrence in *Thomas*, 323 U.S. at 545, in which he stated:

> A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person making a speech

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however, a physician's or surgeon's certificate is needed for someone to treat any disease, including mental conditions, regardless of whether a fee is charged. *See id.* § 2051. "Any person who practices or attempts to practice, or who advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state . . . is guilty of a misdemeanor." *Id.* § 2052. In 1941, however, then California Attorney General Earl Warren interpreted the "medicine" licensing law to prohibit the unlicensed practice of psychoanalysis regardless of whether any fee was charged. *See* Cal. Op. Atty. Gen. N835334 (May 22, 1941).

Under the most logical reading of California's current statutory scheme, however, psychoanalysis is no longer included in the medical licensing scheme because it is explicitly referenced in the psychology licensing statute. "Psychoanalyst" is included as an inappropriate title for an unlicensed person under Cal. Bus. & Prof. Code § 2902(c), which was amended as recently as 1989. The Legislature could have made clear that psychoanalysis was prohibited by the medical licensing laws, but it did not do so; instead, it explicitly referenced psychoanalysis in the psychology licensing laws. *Cf. Russello v. United States*, 464 U.S. 16, 23-24, (1983) ("Where Congress includes language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation and internal quotation marks omitted).

> . . . Likewise, the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.

Id. (Jackson, J., concurring).

Although the California laws and regulations may require certain training, speech is not being suppressed based on its message. Plaintiffs argue that the licensing scheme regulates the content of speech because the Board's psychological examination tests only certain areas, including the biological bases of behavior, research methods, and assessment and diagnosis. Plaintiffs contend that psychoanalysts, on the other hand, are trained in such areas as Jungian understanding of personality, techniques for the activation and interpretation of the unconscious, and archetypal material, including mythology and fairy tales. Plaintiffs also allege that the Board uses the content of an institution's curriculum to determine which institutions provide "equivalent" training under California Business and Professions Code §§ 2914 and 2529. The licensing scheme, however, was not adopted because of any disagreement with psychoanalytical theories. *See Crawford,* 96 F.3d at 384. It was adopted for the important purpose of protecting "public health, safety, and welfare." Cal. Bus. & Prof. Code § 2900.

This case is different from *Riley v. National Fed'n of the Blind,* 487 U.S. 781 (1988). In *Riley*, the Supreme Court held that North Carolina's licensing laws for professional fundraisers violated the First Amendment because the state

had "the power directly and substantially to affect the speech they utter." *Id.* at 801. California does not dictate the content of what is said in therapy; the state merely determines who is qualified as a mental health professional. Mental health professionals, unlike fundraisers, safeguard public health interests by monitoring the care and safety of their patients.[9]

Although some speech interest may be implicated, California's content-neutral mental health licensing scheme is a valid exercise of its police power to protect the health and safety of its citizens and does not offend the First Amendment.[10]

3. Prior Restraint

In addition, we hold that the psychology licensing laws are not a prior restraint on speech. *See Baby Tam & Co., Inc. v. City of Las Vegas,* 154 F.3d 1097, 1100 (9th Cir. 1998) ("A prior restraint exists when the enjoyment of protected

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[9] This case is also different from *Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa,* 703 P.2d 1119, 1123-29 (Cal. 1985), in which the California Supreme Court relied on federal case law to invalidate, under Article I, Section 2 of the California Constitution, a city ordinance that completely prohibited the practice of fortune telling and palm reading for a fee. Here, California's licensing scheme does not prohibit psychoanalysis, but merely regulates who can engage in it for a fee.

[10] Plaintiffs concede that, if the licensing scheme is otherwise valid, they have no viable commercial speech claim for the right to use professional titles, such as "psychoanalyst" and "analytical psychologist."

expression is contingent upon the approval of government officials."). Because this is a valid licensing scheme designed to protect the mental health of Californians, the state "may exercise some discretion in granting licenses." *IDK, 836 F.2d at 1196.* Because there is no allegation that the state is revoking or denying licenses "for arbitrary or constitutionally suspect reasons," there is no problem of prior restraint. *Id.*; *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988) (fearing "unbridled discretion" in state officials could result in censorship); *Young v. City of Simi Valley*, 216 F.3d 807, 819 (9th Cir. 2000) ("When an approval process . . . is completely discretionary, there is a danger that protected speech will be suppressed impermissibly because of the government official's . . . distaste for the content of the speech.") (citation omitted).

V. CONCLUSION

In sum, we hold that California's psychology licensing laws do not violate either the First or the Fourteenth Amendment. We thus affirm the district court's dismissal of this action. As the district court noted, plaintiffs' concerns about the licensing of psychoanalysts are "best addressed to the state legislature."

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Entered January 8, 1999; Filed January 7, 1999]

No. C-97-3913 WHO

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS,
Plaintiffs,
v.
CALIFORNIA BOARD OF PSYCHOLOGY, a State Board, et al.
Defendants.

MEMORANDUM DECISION AND ORDER

In this action, the National Association for the Advancement of Psychoanalysis ("NAAP"), Cedrus Monte, Allan Sowers, Lionel Corbett, Barry Williams, and Miriam Marsolais[1] are suing eight members of the California Board

[1] Plaintiffs Williams and Marsolais are not listed in the caption of the complaint. Both parties, however, refer to them as named plaintiffs.

of Psychology, the executive officer of the Board, and the Attorney General for the State of California for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983. Specifically, plaintiffs contend that California's psychology licensing laws violate their First and Fourteenth Amendment rights to freedom of speech, travel, religion and association. Currently before the Court is defendants' motion to dismiss the third amended complaint. For the reasons set forth hereinafter, the motion is granted.

I.

This action has twice been dismissed for lack of standing. On April 28, 1998, the Court granted defendants' motion to dismiss the First Amended complaint.[2] On August 19, 1998, the Court granted defendants' motion to dismiss the second amended complaint for lack of standing. The Memorandum Decision and Order ("Decision") provided the plaintiffs had one more opportunity to amend their complaint to properly allege standing. Although the third amended complaint adequately alleges standing, it is dismissed for failure to state a claim upon which relief can be granted.

A.

The following statement of facts is summarized from the Decision dismissing the second amended complaint and the allegations of the third amended complaint.

NAAP is a membership association of professional

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[2] Plaintiffs voluntarily dismissed their original complaint.

psychoanalysts dedicated to encouraging the study of, and improving the practice of, psychoanalysis in the United States and in other countries. Its membership includes approximately 1,000 certified psychoanalysts and more than 400 psychoanalyst candidates-in-training in thirty-five states nationwide, including California, and five foreign countries. NAAP seeks to bring this suit on its own behalf, as a representative of its members whose practice of psychoanalysis in California allegedly has been unreasonably restricted by California law, and on behalf of California residents who are prevented from retaining those NAAP members for professional psychoanalysis.

Sowers is a psychoanalyst, Presbyterian minister, and resident of New York. He firmly intends to travel to California to establish a psychoanalytic practice in the San Francisco Bay Area as soon as the Court declares that he may lawfully do so. Sowers has been in independent practice as a psychoanalyst and pastoral counselor in New York for more than twenty-eight years. He was certified as a psychoanalyst by the State of Vermont in 1995.

Monte is a Jungian analyst who lives in the Northern District of California. She is a graduate of the C.G. Jung Institute of Zurich, Switzerland. She also received a master's degree in archetypal psychology from California State University at Sonoma in 1987. Monte intends to practice Jungian analysis in California, if it is lawful for her to do so.

Corbett is a professor of depth psychology at the Pacifica Graduate Institute in Santa Barbara, California. He has been licensed as a medical doctor in England, Illinois, New Mexico and Georgia, and has held academic

appointments in departments of psychiatry in four United States medical schools. He is a psychoanalyst member of NAAP, a Diplomat Jungian Analyst of the C.G. Jung Institute of Chicago, and a member of the Royal College of Psychiatrists of London.

Marsolais has a master's degree in Church History and is a candidate for a Ph.D. in medieval history at the University of California at Berkeley. She has a diploma in analytical psychology from the C.G. Jung Institute in Zurich, Switzerland. Marsolais wishes to practice psychoanalysis in California half time.

Williams has a master's degree in divinity, a Psy.D. in psychology and a diploma from the C.G. Jung Institute of Chicago. He has been an adjunct professor at Pacifica Graduate Institute in Santa Barbara, California. He was offered a permanent position at the Institute, but had to decline the offer because California's licensing laws prevent him from practicing psychoanalysis in California. Williams wishes to practice in California half time.

B.

In California, the definition of "psychologist" includes "psychoanalyst." Cal. Bus. & Prof. Code § 2902(c).[3] The practice of psychology is defined as rendering any psychological service to the public for a fee. § 2903. "No person may engage in the practice of psychology, or represent

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[3] Unless indicated otherwise, all references to code sections are to the California Business and Professions Code.

himself to be a psychologist, without a license" except as otherwise provided by statute. Id.

In order to qualify for a license to practice psychology, a person must posses a doctorate degree in psychology or a related field, or an equivalent degree. § 2914(b). An applicant for a license to practice psychology must also have at least two years of supervised professional experience under the direction of a licensed psychologist. § 2914(c). The applicant must also pass an examination, complete training in substance dependency, and fulfill coursework requirements in partner abuse and human sexuality. § 2914(d)-(f); Cal. Code Regs. tit. 16, § 1382.

Nothing in the licensing laws prevent qualified members of other recognized professional groups from doing work of a psychological nature consistent with the laws governing their professions, provided they do not hold themselves out to the public as a psychologist, or use terms that imply they are licensed to practice psychology. § 2908. These other professions include physicians, clinical social workers, family counselors, attorneys or ordained members of the recognized clergy. Id.

Only one California statute specifically addresses the training requirements for psychoanalysts. See § 2529. This statute provides that graduates of certain California psychoanalytic institutes, or institutes deemed equivalent, may engage in psychoanalysis as an adjunct to teaching, training, or research. The parties refer to this position as a research psychoanalyst. Research psychoanalysts may hold themselves out to the public as psychoanalysts, provided they do not use any term or imply in any way that they are licensed to

practice psychology. § 2529. A research psychoanalyst may render psychoanalytic services for a fee for only one-third of his or her professional time. Cal. Code Regs. tit. 16, § 1371.

Any violation of the laws regulating psychologists may be punished as a misdemeanor. § 2970.

II.

Defendants move to dismiss the complaint on several grounds. First, they contend plaintiffs have failed to comply with Rule 8(a) and (e) of the Federal Rules of Civil Procedure by not providing a short and plain statement of the claim showing that plaintiffs are entitled to relief. Second, they argue that this case is not justiciable because plaintiffs have failed to establish standing and their case is not ripe for adjudication. Third, they contend they are entitled to a judgment of dismissal under Rule 12(b) (6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted.

A.

The Federal Rules of Civil Procedure require that all allegations in a complaint be short and plain and that each averment be simple, concise and direct. Fed. R. Civ. P. 8(a), (e) (1). A complaint that fails to comply with Rule 8 (a) and (e) may be dismissed with prejudice. McHenry v. Renne, 84 F.3d 1172, 1177 (9th Cir. 1996). Only egregious violations of pleading rules, including continued refusal to follow court orders regarding pleading requirements, justify dismissal with prejudice. Id. at 1179.

The third amended complaint is lengthy, repetitive and confusing. There are, however, no egregious circumstances warranting the dismissal of the complaint with prejudice for failure to comply with Rule 8. It is understandable that plaintiffs would include lengthy recitations of fact in their third amended complaint in response to the Court's admonishment that they would be given only one more opportunity to successfully allege standing. Therefore, defendants' motion to dismiss for failure to set forth a short and plain statement of their claims is denied.

B.

Defendants also move to dismiss the action for lack of standing and ripeness. The Court will first address the standing issues, and then address defendants' contention that the case is not ripe for adjudication. The standing of individual plaintiffs Monte, Williams, Marsolais, Sowers and Corbett will be addressed separately from the standing of organizational plaintiff NAAP.

1.

To establish standing, plaintiffs must satisfy three elements: (1) they must have suffered some actual or threatened injury; (2) the injury must be fairly traceable to the challenged action; and (3) the injury is likely to be redressed by a favorable decision by the federal court. Valley Forge Christian College v. Americans United For Separation of Church & State, Inc., 454 U.S. 464, 471-72 (1982). When standing is challenged on the basis of the pleadings, the Court must accept as true all material allegations in the complaint and construe the complaint in favor of the complaining party.

Pennell v. City of San Jose, 485 U.S. 1, 7 (1988).

The Decision provided that plaintiffs may be able to establish standing to bring this action if they alleged the manner in which they wish to practice, how they lack the qualifications to do so legally in California, and whether they have applied for a license or precisely why it would be futile to do so. Plaintiffs have specifically alleged facts relating to each of these issues in the third amended complaint.

Plaintiffs have alleged an actual injury. They allege they wish to practice psychoanalysis in California and specifically allege how the current licensing laws prevent them from practicing in California. Plaintiffs allege that as a result of the licensing laws they suffer the loss of fees, referrals and the opportunity to practice in California. Their injuries are directly traceable to the state's licensing laws. A declaration that the licensing laws are unconstitutional would likely redress their injuries.

a.

There is an additional standing requirement when a plaintiff seeks to challenge a licensing statute. A plaintiff generally may not challenge a licensing scheme unless he or she has actually applied for the license. Madsen v. Boise State Univ., 976 F.2d 1219, 1220 (9th Cir. 1992).

Plaintiffs admit they have not applied for licenses to practice psychology. Defendants contend this bars plaintiffs from challenging the licensing laws. Plaintiffs rely on two cases holding that the requirement that a plaintiff first apply

for a license is excused when application would be futile. Desert Outdoor Adver., Inc. v. City of Moreno Valley, 103 F.3d 814 (9th Cir. 1996) (billboard operators could challenge city ordinance regulating sign permits without applying for the permit); Sammon v. New Jersey Bd. Of Med. Examiners, 66 F.3d 639, 643 (3d Cir. 1995) (aspiring midwives did not have to first apply for a midwife license in order to challenge the law when there was no indication they could possibly obtain a license under the existing statute). Plaintiffs argue that there is no purpose in requiring them apply for licenses to practice psychology when rejection is certain. Further, the application process itself would take one to five years and involve substantial costs for plaintiffs.

Defendants seek to distinguish the holding in Desert Outdoor by arguing the plaintiffs were excused from applying for the permit in that case only because they faced a separate enforcement action under the ordinance in state court. 103 F3.d at 818. The court, however, also stated that application would be futile because the ordinance flatly prohibited the plaintiffs' signs. Id. Based on these two reasons, the court held there was no reason to force the plaintiffs to make a futile application before permitting them to bring suit challenging the ordinance. Id.

Defendants also attack the Sammon holding, arguing the Third Circuit incorrectly applied the futile act doctrine derived from racial and sexual discrimination cases. The Sammon court, however, applied the futile act doctrine after examining the rationale for requiring a plaintiff to apply for a license in order to have standing. The Third Circuit noted that the purpose of the application requirement is to avoid premature adjudication of disputes and entangling courts in

abstract disagreements. 66 F.3d at 643. The Ninth Circuit has articulated similar rationales for the application requirement. See Madsen, 976 F.2d at 1221-22 (application requirement establishes the existence of a well-defined controversy and identifies those who have suffered an injury from those who have not).

Here, there is a well-defined controversy and plaintiffs have suffered injury. They have alleged a present desire to practice psychoanalysis in California and alleged in detail how the current state licensing laws bar them from practice. The application process is lengthy and burdensome, and plaintiffs have successfully alleged that it would be futile for them to apply for licenses.

b.

When a plaintiff challenges a statute, the Article III requirements have been further refined to require that the plaintiff demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation. Bland v. Fessler, 88 F.3d 729, 737 (9th Cir. 1996). Standing requirements do not require an actual prosecution so long as there exists a credible threat of prosecution under the statute. Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979).

Defendants contend that plaintiffs suffer no genuine threat of prosecution. They argue that a mere possibility that a plaintiff may be prosecuted at an unspecified date in the future is not enough to establish standing, citing San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1127 (9th Cir. 1996). In Gun Rights, the plaintiffs challenged the

constitutionality of the Violent Crime Control and Enforcement Act. The Ninth Circuit held that the plaintiffs did not have standing to bring suit because they faced no threat of prosecution and there was an absence of any past prosecutions under the Act. Id. at 1127-28. The Gun Rights court noted that a history of prosecutions under a statute demonstrates the willingness of the government to enforce the statute, and corroborates the imminence of the threat of prosecution. Id. at 1128.

The complaint alleges that defendants actively enforce the licensing laws and that California has a national reputation as the most vigorous and effective psychology licensing law enforcement program in the country. Plaintiffs also cite instances where the licensing laws have been enforced against unlicensed psychoanalysts. They have sufficiently alleged that they face an actual threat of prosecution under the licensing statute.

c.

Defendants also allege that plaintiffs' case should be dismissed due to prudential concerns regarding standing. They argue that federal courts have refrained from adjudicating cases where plaintiffs allege only "abstract questions of wide public significance which amount to generalized grievances pervasively shared and most appropriately addressed in the representative branches." Id. at 1131.

Plaintiffs do not allege a general grievance involving only abstract questions. They specifically challenge licensing laws that burden an identifiable class of persons - trained

pyschoanalysts who wish to practice in California and who do not meet California's licensing requirements. Therefore, the Court rejects defendants' argument for dismissal based on concerns regarding prudential standing.

2.

Defendants also contend that NAAP lacks standing to bring this action.

a.

NAAP alleges it has suffered direct economic injury as a result of the licensing statute, including loss of members from California and the resulting loss of income from membership dues. Economic injury is clearly a sufficient basis for standing. Central Ariz. Water Conservation Dist. V. EPA, 990 F.2d 1531, 1537 (9th Cir. 1993), cert. denied, 510 U.S. 828 (1993). NAAP's financial injury is traceable to California's licensing laws, and a declaration that the licensing laws are unconstitutional will redress their injury. Therefore, NAAP has established standing on its own behalf.

b.

NAAP also alleges it has standing to sue on behalf of its members. An association has standing to bring a suit on behalf of its members where its members would otherwise have standing to sue in their own right, the interests they seek to protect are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343

(1997).

As discussed above, the individual plaintiffs have standing to sue in their own right. Defendants do not challenge that NAAP seeks to protect an interest germane to the organization's purpose. Rather, defendants argue that NAAP's claim for relief would require the participation of individual members in the lawsuit. Defendants rely on Lake Mohave Boat Owners Ass'n v. National Park Service, 78 F.3d 1360 (9th Cir. 1995), where the Ninth Circuit held that a boat owners association did not have standing to bring a claim for restitution against the government because the relief requested would require individual proof o f each owner's claim. Id. at 1367. NAAP, however, seeks declaratory and injunctive relief, not damages for losses incurred by individual members. Its claim does not require proof of individual members' claims in order to find the licensing laws are unconstitutional. Accordingly, NAAP has established that it has standing to bring this suit.

3.

Defendants contend that this case is not ripe for adjudication. In deciding whether a controversy is ripe for judicial determination, the Court should consider whether the issues are fit for judicial decision and whether the parties will suffer hardship if the Court declines to consider the issues. American-Arab Anti-Discrimination Comm. v. Thornburgh, 970 F.2d 501, 510-12 (9th Cir. 1991). In American-Arab, aliens and organizations representing their interests challenged the constitutionality of certain immigration provisions. Id. at 504-05. The Ninth Circuit held the issue was not ripe for adjudication because the factual record was not well

developed and the Immigration and Naturalization Service had not yet had the opportunity to interpret the challenged provisions. Id. at 511.

In this action the facts are well developed. Further, there is no need for the Board of Psychiatry to interpret the challenged statute in this case. Plaintiffs have alleged in great detail their professional backgrounds, their desire to practice in California and why the licensing statutes prevent them form practicing in California. The Court finds that plaintiffs claims are ripe for review.

C.

Defendants also move to dismiss plaintiffs' action for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

Plaintiffs contend that California's licensing laws violate their First and Fourteenth Amendment rights to freedom of speech, travel and association. Sowers and Monte allege that their First and Fourteenth Amendment right to freedom of religion has been violated.

1.

Plaintiffs contend that this is a First Amendment case because expression is the essence of psychoanalysis. They argue that unlike other professions, psychoanalysis does not entail any essential, nonspeech aspects.

Plaintiffs rely on IDK, Inc. v. County of Clark, 836 F.2d 1185 (9th Cir. 1988). In IDK, an escort service

challenged a county licensing regulation governing the escort industry. In rejecting the plaintiffs' argument that their profession involved an expressive association protected under the First Amendment, the Ninth Circuit noted that the plaintiffs had made no claim that expression was a significant or necessary component of the plaintiffs' activity. Id. at 1195. Plaintiffs seize upon this language to assert that they have alleged that expression is a necessary component of psychoanalysis and therefore they are protected under the First Amendment. The Ninth Circuit, however, did not hold that a professional licensing scheme is subject to strict scrutiny if a party can establish that expression is a significant component of their profession. In fact, it noted that "numerous examples could be cited of communications that are regulated without offending the First Amendment." Id. at 1194 (citations omitted).

Plaintiffs simply fail to allege how the practice of psychoanalysis is any different than other professions that rely on communication as a tool of the trade. Psychoanalysis may very well rely heavily on speech. It is not simply the psychoanalyst's speech that a patient pays for, however, it is the psychoanalyst's training. In fact, the key component of psychoanalysis is the treatment of emotional suffering and depression, not speech. (See Third Am. Compl., Ex. 2 at 3, Corbett Decl.) That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection.

At oral argument, plaintiffs cited Justice Jackson's concurring opinion in Thomas v. Collins, 323 U.S. 516, 544 (1945), as support for the contention that their speech is protected because it is not incidental to the practice of

psychoanalysis. Justice Jackson's concurrence does not support plaintiffs' contention. In Collins, the Supreme Court struck down a Texas statute that prohibited a person from soliciting membership in a labor union without first obtaining a license from the state. Id. at 518. The Collins case involved political speech, which is at the core of First Amendment protection. Id. at 547-48. Justice Jackson endorsed the state's power to prohibit the practice of medicine without a license, but rejected the state's ability to make it a crime to speak urging persons to follow or reject any school of medical thought. Id. at 544. The licensing laws in this case do not impose any penalty for speaking about psychoanalysis in the state. The licensing laws merely prohibit plaintiffs from holding themselves out as licensed professionals and treating patients for a fee, unless they meet California's training requirements. This does not offend the First Amendment.

Plaintiffs also cite Spiritual Psychic Science Church of Truth, Inc. v. City of Azusa, 39 Cal. 3d 501, 217 Cal. Rptr. 225 (1985), to support their contention that the psychology licensing laws violate the First Amendment. In Spiritual Psychic, the California Supreme Court invalidated a city ordinance that prohibited the practice of fortune telling and palm reading. Id. at 518. The court held that fortune telling was protected speech under article I, section 2, of the California Constitution, which provides in part that "' [e]very person may freely speak, write and publish his or her sentiments on all subjects....'" Id. at 519 (quoting Wilson v. Superior Court, 13 Cal. 3d 652, 658, 119 Cal. Rptr. 468, 472 (1975).

There are two reasons why plaintiffs' reliance on Spiritual Psychic is unpersuasive. First, Spiritual Psychic was a challenge under the free speech provision of the California Constitution, a provision which is "'more definitive and inclusive than the First Amendment.'" Id. at 519. Second, the Court struck down the ordinance because its complete prohibition of fortune telling for a fee was not tailored to address the important state interest in protecting the public from fraud. Id. at 518-19. Here, however, the psychology licensing laws do not ban the practice of psychoanalysis for a fee in California. The licensing laws merely set forth certain training requirements that must be met before a person may practice psychoanalysis for a fee in California. Plaintiffs do not face a total ban on speech. Accordingly, the Court finds that Spiritual Psychic is distinguishable.

Plaintiffs argue the licensing laws are a prior restraint on their freedom of speech and association. When substantial first amendment rights are not implicated, however, a licensure requirement does not operate as a prior restraint on expression. IDK, 836 F.2d at 1196. As discussed above, plaintiffs have failed to demonstrate that the licensure statute implicates substantial First Amendment rights.

Nor do the licensing laws unconstitutionally restrict plaintiffs' commercial speech. The licensing laws restrict plaintiffs' ability to hold themselves out to the public using the words psychological, psychologist, psychological, or otherwise imply that they are licensed to practice psychology. § 2908. Plaintiffs contend this unconstitionally prohibits them from truthfully using titles and descriptions that accurately describe their profession.

A professional regulation is not invalid, nor is it subject to First Amendment strict scrutiny, merely because it restricts some kinds of speech. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456-57 (1978) (state can regulate attorney conduct deemed harmful to public, even though speech is a component of the activity). In Accountant's Soc'y of Va. v. Bowman, 860 F.2d 602 (4th Cir. 1988), the Fourth Circuit upheld a similar restriction prohibiting unlicensed accountants from using the words "public accountant" or "PA." The court stated these words are trade names and their use could be restricted as part of a valid licensing scheme. Id. at 605. See also Friedman v. Rogers, 440 U.S. 1, 15 (1979) (the state has an interest in protecting the public from deceptive and misleading use of trade names).

The state has an interest in protecting the public from those who lack the requisite qualifications to hold themselves out as licensed professionals. See Bowman, 860 F.2d at 605. The ban on using the word psychologist or related trade names by anyone who fails to meet certain training requirements is a constitutionally permissible regulation of commercial speech.

2.

Plaintiffs claim there is a protected First Amendment associational right between the psychoanalyst and the patient. They have, however, cited no authority that the association rights protected under the First Amendment have any application to this case. Rather, plaintiffs rely on the IDK case, which involved associational rights under the Fourteenth Amendment. Plaintiffs' allegations are based on a misreading of the IDK decision. The IDK court's discussion of protected

associational rights addressed intimate association under the Fourteenth Amendment. 836 F.2d at 1193. Recognized intimate associational rights are those rights that "'attend the creation and sustenance of a family' and similar 'highly personal relationships.'" IDK, 836 F.2d at 1193 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984)).

The IDK court rejected the argument that there was any protected intimate association right between the escort and the client. Id. at 1193. Plaintiffs have not cited any case law even suggesting that the doctor-patient relationship rises to the level of an intimate familial relationship protected by the Fourteenth Amendment. Furthermore, the licensing laws do not interfere with any intimate relationship, they merely prohibit one party from collecting fees for the relationship. The Court finds that there is no protected associational right between a psychoanalyst and a patient.

3.

Sowers and Monte also claim that the licensing laws unconstitutionally entangle state officials in the content of their religious counseling. There is, however, a specific exemption in the licensing laws for ordained members of the recognized clergy. § 2908. Sowers and Monte do not allege how or why their religious practice is not accommodated by this exemption. This claim for relief merely restates plaintiffs' allegations regarding speech, and is rejected on the same grounds.

Only plaintiffs' unspecified Fourteenth Amendment claims remain. Although Plaintiffs have failed to clearly state their remaining Fourteenth Amendment claim, defendants have amply demonstrated that plaintiffs have no viable claim under any possible Fourteenth Amendment theory.

There is no constitutional right to be admitted to a profession. Massachusetts Bd. Of Retirement v. Murgia, 427 U.S. 307, 313 (1976). The police power of the states extends to the regulation of certain trades, particularly those that concern public health. Watson v. Maryland, 218 U.S. 173, 176 (1909). The rational relationship test is traditionally applied in cases involving occupational licensing, including those concerning the practice of the healing arts. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488-489 (1955). A licensing statute may be struck down only if there is no rational connection between the challenged statute and a legitimate government objective. Id. at 488.

In California, the requirements to obtain a license to practice psychology are clearly set forth under the licensing laws, as described in Section I above. Defendants contend that the California legislature could rationally have decided that the education afforded in many psychoanalytic programs would be inadequate for proper psychiatric diagnosis and treatment. In Maguire v. Thompson, 957 F.2d 374 (7th Cir. 1992), alternative practitioners challenged the Illinois Medical Practice Act that established a licensing scheme for the practice of medicine and other healing arts. Id. at 375. The Seventh Circuit held that the Illinois legislature could rationally have concluded that the medical education specified

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in the licensing statutes provided better training than the training received by the alternative practitioners. Id. at 377. The Seventh Circuit concluded the state had adequately justified its licensing statute. Id. at 378.

Plaintiffs argue that they have adequately alleged that the licensing requirements bear no rational relationship to the practice of psychoanalysis. Plaintiffs cite only one federal case where a plaintiff's claim that a licensing statute was irrational survived a motion to dismiss. Cornwell v. California Bd. of Barbering & Cosmetology, 962 F. Supp. 1260, 1273 (S.D. Cal. 1997). In Cornwell, the court found that the plaintiff had adequately alleged that the training required for a California cosmetology license was largely irrelevant to the plaintiff's practice of African hair braiding. Id. at 1173. Plaintiffs also cite a California Supreme Court case holding that there was no rational relationship between the protection of public health and the exclusion from licensure of medical practitioners trained in osteopathic, rather than allopathic, colleges. D'Amico v. Board of Med. Examiners, 11 Cal. 3d 1, 112 Cal. Rptr. 786 (1974). The court found there was no rational basis to distinguish the practice of osteopathic from allopathic medicine because both are complete schools of medicine whose practitioners engaged in all the activities commonly thought of as constituting medical science. Id. at 22.

Cornwell and D'Amico are distinguishable from the facts in this action. This not a case where plaintiffs are being squeezed into a licensing category that may not fit. The California legislature has expressly considered regulation of psychoanalysis and set forth the qualifications for practicing psychoanalysis in the state.

Plaintiffs also contend that the licensing laws are irrational because of the research psychoanalyst provision. § 2529; Cal. Code Reg. Tit. 1367, et seq. The research psychoanalyst law permits persons with certain educational requirements to practice psychoanalysis for a fee so long as they confine their practice to one-third of their professional time. Cal. Code Regs. tit. 16, § 1371. Defendants point out that this provision does not constitute an alternative route to licensure, but is a specific, narrowly-drawn exemption to the licensing requirements. It is not unusual or irrational to provide exemptions in a licensure statute. In fact, the licensing laws provide other exemptions as well. See §§ 2909 and 2910 (exempting certain employees of schools and government agencies); and § 2912 (exempting psychologists licensed in other jurisdictions to practice in California for up to thirty days per year).

Plaintiffs have failed to allege any reason why California's licensing laws are not rationally related to the legitimate state interest of protecting the health and safety of California citizens. The court understands that plaintiffs have genuine concerns about the licensing of psychoanalysts. Their claims do not rise to the level of a constitutional violation, however, and are best addressed to the state legislature. The Court dismisses plaintiffs' complaint with prejudice for failure to state a claim upon which relief can be granted.

IV.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motion to dismiss the third amended complaint for failure to comply with the pleading requirements of Rule 8(a) and (e) of the Federal Rules of Civil Procedure is DENIED.

2. Defendants' motion to dismiss the action on the grounds that plaintiffs lack standing and that the case is not ripe for adjudication is DENIED.

3. Defendants' motion to dismiss the action for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is GRANTED. The action is dismissed with prejudice.

Dated: January 7, 1999.

/s/_____
William H. Orrick
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

[Entered January 7, 1999]

No. C-97-3913 WHO

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, *Plaintiffs*,	)
v.	)
CALIFORNIA BOARD OF PSYCHOLOGY, a State Board, et al. *Defendants*.	)

JUDGMENT

This matter having come before the Court, and the issues having been duly presented, and a decision having been duly rendered,

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Defendants' motion to dismiss the third amended complaint for failure to comply with the pleading requirements of Rule 8(a) and (e) of the Federal Rules of Civil Procedure is DENIED.

2. Defendants' motion to dismiss the action on the grounds that plaintiffs lack standing and that the case is not ripe for adjudication is DENIED.

3. Defendants' motion to dismiss the action for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is GRANTED. The action is dismissed with prejudice.

Dated: January 7, 1999.

/s/_____
William H. Orrick
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Entered and Filed November 9, 2000]

No. 99-15243

D.C. No. CV 97-3913 WHO

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, a Delaware corporation; CEDRUS MONTE; ALLAN D. SOWERS; LIONEL CORBETT,
Plaintiffs-Appellants,

v.

CALIFORNIA BOARD OF PSYCHOLOGY, a state board (Board); BILL LOCKYER, California State Attorney General; STATE OF CALIFORNIA; THOMAS O'CONNOR, the Board's executive officer in his official capacity only; BRUCE EBERT; JUDITH JANARO FABIAN; LILLI FRIEDLAND; MARTIN GREENBERG; LINDA HEE; MARY McMILLAN; MARILYN PALAREA; MARY ELLEN EARLY; EMIL RODOLFA, PhD,
Defendants-Appellees.

ORDER

Before: TASHIMA and GRABER, Circuit Judges, and KELLEHER,* Senior District Judge.

The panel has voted to deny the petition for panel rehearing. Judges Tashima and Graber vote to deny the petition for rehearing en banc and Judge Kelleher so recommends. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote en banc rehearing. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

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* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

APPENDIX D

All references to code sections in this Petition are to the California Business and Professions Code, and all references to regulations are to Title 16 of the California Code of Regulations ("CCR"), unless indicated otherwise.

PSYCHOLOGY LICENSING LAW
California Business and Professions Code

§ 2900. The Legislature finds and declares that practice of psychology in California affects the public health, safety, and welfare and is to be subject to regulation and control in the public interest to protect the public from the unauthorized and unqualified practice of psychology and from unprofessional conduct by persons licensed to practice psychology.

§ 2902. * * *

(b) "Board" means the Board of Psychology.

(c) A person represents himself or herself to be a psychologist when the person holds himself or herself out to the public by any title or description of services incorporating the words "psychology,"* * * "psychoanalysis," or "psychoanalyst" * * *.

§ 2903. No person may engage in the practice of psychology, or represent himself to be a psychologist, without a license granted under this chapter, except as otherwise provided in this chapter. The practice of psychology is defined as rendering or offering to render for a fee to individuals, groups, organizations or the public any

psychological service involving the application of psychological principles, methods, and procedures of understanding, predicting, and influencing behavior, such as the principles pertaining to learning, perception, motivation, emotions, and interpersonal relationships; and the methods and procedures of interviewing, counseling, psychotherapy, behavior modification, and hypnosis; and of constructing, administering, and interpreting tests of mental abilities, aptitudes, interests, attitudes, personality characteristics, emotions, and motivations.

The applications of such principles and methods includes, but is not restricted to: diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and groups.

Psychotherapy within the meaning of this chapter means the use of psychological methods in a professional relationship to assist a person or persons to acquire greater human effectiveness or to modify feelings, conditions, attitudes and behavior which are emotionally, intellectually, or socially ineffectual or maladjustive.

As used in this chapter, `fee' means any charge, monetary or otherwise, * * * for services rendered.

§ 2908. Nothing in this chapter shall be construed to prevent qualified members of other recognized professional groups licensed to practice in the State of California, such as, but not limited to, physicians, clinical social workers, educational psychologists, marriage, family and child counselors, optometrists, psychiatric technicians, or registered nurses, or attorneys admitted to the California State Bar, or

persons utilizing hypnotic techniques by referral from persons licensed to practice medicine, dentistry or psychology, or persons utilizing hypnotic techniques which offer avocational or vocational self-improvement and do not offer therapy for emotional or mental disorders, or duly ordained members of the recognized clergy, or duly ordained religious practitioners from doing work of a psychological nature consistent with the laws governing their respective professions * * *.

§ 2914. Each applicant for licensure shall comply with all of the following requirements: * * *

(b) Possess an earned doctorate degree (1) in psychology, (2) in education psychology, or (3) in education with the field of specialization in counseling psychology or educational psychology. Except as provided in subdivision (g), this degree or training shall be obtained from an accredited university, college, or professional school. * * *

(c) Have engaged for at least two years in supervised professional experience under the direction of a licensed psychologist * * *.

(d) Take and pass the examination required by Section 2941 unless otherwise exempted by the board under this chapter.

(e) Show by evidence satisfactory to the board that he or she has completed training in the detection and treatment of alcohol and other chemical substance dependency. * * *

(f) Show by evidence satisfactory to the board that he or she has completed coursework, in spousal or partner abuse assessment, detection, and intervention. * * *

§ 2941. Each applicant for a psychology license shall be examined by the board * * *

§ 2942. The board may examine by written or oral examination or by both. * * * [16 Calif. Code of Regulations §1388(a): "The [psychology] examination shall consist of both a written and an oral examination."]

§ 2943. The board may examine for knowledge in whatever theoretical or applied fields in psychology as it deems appropriate. It may examine the candidate with regard to his or her professional skills and his or her judgment in the utilization of psychological techniques and methods.

§ 2970. Any person who violates any of the provisions of this chapter shall be guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand dollars ($2,000), or by both.

§ 2971. Whenever any person other than a licensed psychologist has engaged in any act or practice that constitutes an offense against this chapter, the superior court of any county, on application of the board, may issue an injunction or other appropriate order restraining that conduct. * * *.

PSYCHOLOGY REGULATIONS
Title 16 of the California Code of Regulations

16 CCR § 1387. Supervised Professional Experience

* * * * *

(a) Pursuant to section 2914(c) of the code, two years of qualifying SPE shall be completed and documented prior to licensure. One year of SPE shall be defined as 1500 hours.

At least one year of SPE shall be completed postdoctorally.

* * *

(b) Supervision Requirements:

* * * * *

(6) The primary supervisor shall be employed in the same work setting at least half the time as the supervisee and be available to the supervisee 100% of the time the supervisee is accruing SPE. * * *

(7) SPE shall not be obtained from supervisors who have received payment, monetary or otherwise, from the supervisee for the purpose of providing such supervision.

(8) SPE gained while the supervisee is functioning in any other professional capacity under another license or credential, shall not be credited toward meeting the requirements for the psychologist's license.

* * * * *

16 CCR § 1391.8. Employer-Employee Business Relationship

(a) No supervisor or employer of a psychological assistant may charge a fee or otherwise require monetary payment in consideration for the employment or supervision of a psychological assistant.

* * * * *

MARRIAGE AND FAMILY THERAPY LAW
California Business and Professions Code

§ 4980. (a) Many California families and many individual Californians are experiencing difficulty and distress, and are in need of wise, competent, caring,

compassionate, and effective counseling in order to enable them to improve and maintain healthy family relationships. Healthy individuals and healthy families and healthy relationships are inherently beneficial and crucial to a healthy society, and are our most precious and valuable natural resource. Marriage, family, and child counselors provide a crucial support for the well-being of the people and the State of California.

(b) No person may for remuneration engage in the practice of marriage, family, and child counseling as defined by Section 4980.02, unless he or she holds a valid license as a marriage, family, and child counselor * * *.

§ 4980.02. For the purpose of this chapter, the practice of marriage, family, and child counseling shall mean that service performed with individuals, couples, or groups wherein interpersonal relationships are examined for the purpose of achieving more adequate, satisfying, and productive marriage and family adjustments. This practice includes relationship and premarriage counseling.

The applications of marriage, family, and child counseling principles and methods includes, but is not limited to, the use of applied psychotherapeutic techniques, to enable individuals to mature and grow within marriage and the family, and the provision of explanations and interpretations of the psychosexual and psychosocial aspects of relationships.

§ 4980.10. A person engages in the practice of marriage, family, and child counseling who performs or offers to perform * * * such a service for remuneration in any form, including donations.

§ 4980.40. To qualify for a license an applicant shall have all the following qualifications:

(a) Applicants applying for licensure on or after January 1, 1988, shall possess a doctor's or master's degree in marriage, family, and child counseling, marital and family therapy, psychology, clinical psychology, counseling psychology, counseling with an emphasis in marriage, family, and child counseling, or social work with an emphasis in clinical social work * * *. In order to qualify for licensure pursuant to this subdivision, any doctor's or master's degree program shall contain no less than 48 semester or 72 quarter units of instruction. The instruction shall include no less than 12 semester units or 18 quarter units of coursework in the areas of marriage, family, and child counseling, and marital and family systems approaches to treatment. The coursework shall include all of the following areas: (1) The salient theories of a variety of psychotherapeutic orientations directly related to marriage, family, and child counseling, and marital and family systems approaches to treatment. (2) Theories of marriage and family therapy and how they can be utilized in order to intervene therapeutically with couples, families, adults, children, and groups. (3) Developmental issues and life events from infancy to old age and their effect upon individuals, couples, and family relationships. This may include coursework that focuses on specific family life events and the psychological, psychotherapeutic, and health implications that arise within couples and families, including, but not limited to, childbirth, child rearing, childhood, adolescence, adulthood, marriage, divorce, blended families, stepparenting, and geropsychology. (4) A variety of approaches to the treatment of children. The board may, by regulation, further define the content requirements of required courses specified in this subdivision.

* * * * *

(f) All applicants shall have at least two years' experience that meets the requirements of this chapter in interpersonal relationships, marriage, family, and child counseling and psychotherapy under the supervision of a licensed marriage, family, and child counselor, licensed clinical social worker, licensed psychologist, or a licensed physician certified in psychiatry by the American Board of Psychiatry and Neurology. * * *

(g) The applicant shall pass a written examination and an oral examination conducted by the board or its designees.

* * * * *

§ 4980.43. (a) For all applicants, a minimum of two calendar years of supervised experience is required, which experience shall consist of 3,000 hours obtained over a period of not less than 104 weeks. Not less than 1,500 hours of experience shall be gained subsequent to the granting of the qualifying master's or doctor's degree. * * *

(b) All applicants and registrants shall be at all times under the supervision of a supervisor * * *. Experience shall be gained by interns and trainees either as an employee or as a volunteer in any allowable work setting specified in this chapter. * * * Experience shall not be gained by interns or trainees as an independent contractor.

* * * * *

§ 4980.50. Every applicant who meets the educational and experience requirements and applies for a license as a marriage, family, and child counselor shall be examined by the board. * * * The board shall examine the candidate with regard to his or her knowledge and professional skills and his or her judgment in the utilization of appropriate techniques and methods. * * *

§ 4983. Any person who violates any of the provisions of this chapter is guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars ($2,500), or by both.

§ 4983.1. In addition to other proceedings provided for in this chapter, whenever any person has engaged, or is about to engage, in any acts or practices which constitute, or will constitute, an offense against this chapter, the superior court in and for the county wherein the acts or practices take place, or are about to take place, may issue an injunction, or other appropriate order, restraining such conduct on application of the board, the Attorney General, or the district attorney of the county.

* * * * *

CLINICAL SOCIAL WORK LICENSING LAW
California Business and Professions Code

§ 4996. It is unlawful for any person to engage in the practice of clinical social work unless at the time of so doing such person holds a * * * license under this article.

§ 4996.1. The board shall issue a licensed clinical social worker license to each applicant who qualifies therefor, and if required to take it, successfully passes the examination given pursuant to this article.

§ 4996.2. Each applicant shall furnish evidence satisfactory to the board that he or she complies with all of the following requirements:

(a) Is at least 21 years of age.

(b) Has received a master's degree from an accredited school of social work.

(c) Has had two years of supervised post-masters degree experience, as specified in Section 4996.20.

(d) Has not committed any crimes * * * .

(e) Has completed adequate instruction and training in the subject of alcoholism and other chemical substance dependency. This requirement applies only to applicants who matriculate on or after January 1, 1986.

(f) Has completed instruction and training in spousal or partner abuse assessment, detection, and intervention. * * * This requirement applies only to applicants who begin graduate training on or after January 1, 1995. * * *

§ 4996.9. The practice of clinical social work is defined as a service in which a special knowledge of social resources, human capabilities, and the part that unconscious motivation plays in determining behavior, is directed at helping people to achieve more adequate, satisfying, and productive social adjustments. The application of social work principles and methods includes, but is not restricted to, counseling and using applied psychotherapy of a nonmedical nature with individuals, families, or groups; providing information and referral services; explaining or interpreting the psychosocial aspects in the situations of individuals, families, or groups * * *.

Psychotherapy, within the meaning of this chapter, is the use of psychosocial methods within a professional relationship, to assist the person or persons to achieve a better psychosocial adaptation, to acquire greater human realization of psychosocial potential and adaptation, to modify internal and external conditions which affect individuals, groups, or

communities in respect to behavior, emotions, and thinking, in respect to their intrapersonal and interpersonal processes.

§ 4996.12. Any person who violates this chapter shall be guilty of a misdemeanor punishable by imprisonment in the county jail not exceeding a period of six months, or by a fine not exceeding one thousand dollars ($1,000), or by both.

CLINICAL SOCIAL WORK REGULATIONS
Title 16 of the California Code of Regulations

16 CCR § 1877. Examinations

The examination may consist of, but is not necessarily limited to, the following:
(a) A written examination designed to determine an applicant's knowledge, familiarity with the field, and practical understanding of the principles, techniques, objectives, theory and laws under which he or she must operate; and
(b) An oral examination or qualifications appraisal designed to assess the applicant's maturity of judgment, knowledge of the application of psychosocial and psychotherapeutic methods and measures in treatment, and ability to assume professional responsibilities.

RESEARCH PSYCHOANALYST LAW
California Business and Professions Code

§ 2529. Graduates of the Southern California Psychoanalytic Institute, the Los Angeles Psychoanalytic Society and Institute, the San Francisco Psychoanalytic Institute, the San Diego Psychoanalytic Institute, or institutes deemed equivalent by the Division of Licensing who have

completed clinical training in psychoanalysis may engage in psychoanalysis as an adjunct to teaching, training, or research and hold themselves out to the public as psychoanalysts, and students in such institutes may engage in psychoanalysis under supervision, provided that such students and graduates do not hold themselves out to the public by any title or description of services incorporating the words "psychological," "psychologist," "psychology," "psychometrists," "psychometrics," or "psychometry," or that they do not state or imply that they are licensed to practice psychology.

Those students and graduates seeking to engage in psychoanalysis under this chapter shall register with the Division of Licensing, presenting evidence of their student or graduate status. The division may suspend or revoke the exemption of such persons for unprofessional conduct as defined in Sections 725, 2234, and 2235.

RESEARCH PSYCHOANALYST REGULATIONS
Title 16 of the California Code of Regulations

16 CCR § 1367. Citation

This chapter may be cited and referred to as the "Research Psychoanalyst Regulations."

16 CCR § 1367.1. Definitions

As used in this article:
(a) "Research Psychoanalyst" means psychoanalyst who is registered with the division.

(b) "Student" means a person enrolled in a psychoanalytic institution for training in psychoanalysis who is registered with the division.
(c) "Graduate psychoanalyst" means a licensed physician, psychologist, clinical social worker or marriage, family and child counselor who has had training in psychoanalysis equal to that specified in Section 1374 or a research psychoanalyst who is a graduate of either a psychoanalytic institute specified in Section 2529 of the code or a psychoanalytic institution deemed equivalent by the division which meets the criteria set forth in Section 1374.
(d) "Psychoanalytic institution" means any institution, institute, department or program organized to provide training in psychoanalytic theory and technique meeting the criteria of Section 1374 and which certifies or graduates students engaged in such training.
(e) "Research psychoanalysts law" means Chapter 5.1 of Division 2 of the code.

16 CCR § 1371. Adjunct Defined

A research psychoanalyst may engage in psychoanalysis as an adjunct to teaching, training or research. "Adjunct" means that the research psychoanalyst may not engage in a full-time clinical practice rendering psychoanalytic services on a fee-for-service basis. A research psychoanalyst may render psychoanalytic services on a fee-for-service basis for not more than an average of one-third of his or her total professional time including time spent in practice, teaching, training or research. Such teaching, training or research shall be the primary activity of the research psychoanalyst. This primary activity may be demonstrated by

(a) A full-time faculty appointment at the University of California, a state university or college, or an accredited or approved educational institution as defined in Section 94310, subdivisions (a) and (b), of the Education Code.
(b) Significant ongoing responsibility for teaching or training as demonstrated by the amount of time devoted to such teaching or training or the number of students trained; or
(c) A significant research effort demonstrated by publications in professional journals or publication of books.

16 CCR § 1372. Supervision of Students Required

Students may practice psychoanalysis under proper supervision as set forth in Section 1373.

16 CCR § 1373. Criteria for Supervision

(a) Each supervisor of a student shall be a graduate psychoanalyst who has a minimum of five years of postgraduate clinical experience in psychoanalysis following completion of his or her psychoanalytic education.
(b) Each such supervisor shall
(1) provide individual supervision of each student for a minimum of one (1) hour for each week per case of patient psychoanalysis for the first year of such supervision, then no less than one (1) hour per case each month thereafter;
(2) supervise no more students than, in the judgment of the training institute, can be effectively supervised.
(c) There shall be a minimum of 50 hours of supervision for each case for a total of at least 150 hours of supervision during training.

16 CCR § 1373.1. Registration After Graduation

Any person who has been registered with the division as a research psychoanalyst student who wishes to continue to perform psychoanalysis shall, upon completion of training in psychoanalysis, register with the division as a research psychoanalyst.

16 CCR § 1374. Criteria for Equivalent Psychoanalytic Institutes

In order to be deemed an equivalent psychoanalytic institute, such an institute, department or program shall meet the following criteria:

(a) Have a curriculum which is designed and implemented by a faculty which is predominantly graduate psychoanalysts;

(b) Insure that each student has practical clinical exposure to a wide variety of psychopathologies and training in their differential diagnosis;

(c) Require each research psychoanalyst student prior to admission to have received a doctorate degree, or its equivalent in education and experience from the University of California, a state university or college, an educational institution which is accredited or approved pursuant to section 94310 of the Education Code or an educational institution located outside the state which has accreditation by a national or applicable regional accrediting agency recognized by the United States Department of Education;

(d) Require each research psychoanalyst student prior to admission to have shown achievement in teaching, training or research with demonstrated aptitude in his or her primary filed of scholarly or scientific endeavor;

(e) Require each student to participate in at least 560 hours of classroom training over at least three (3) years on all phases of psychoanalysis;
(f) Require each student to participate in continuous case conferences conducted by graduate psychoanalysts;
(g) Require each student to undergo a minimum of 300 hours personal psychoanalysis conducted by a graduate psychoanalyst who has a minimum of five years of postgraduate clinical experience in psychoanalysis following the completion of his or her psychoanalytic education;
(h) Require each student to conduct at least three (3) psychoanalyses under the supervision of three different graduate psychoanalysts, at least one of which is taken to termination except in those rare instances where a delay may post an extreme hardship to the student and the institute has made provision for continuing supervision of the student after graduation until at least one case is taken to termination;
(i) Require each student to either pass a comprehensive examination or write an approved thesis.

16 CCR § 1375. Applicants from Equivalent Institutions

(a) Any applicant from a psychoanalytic institution which is claimed to be equivalent to an institute specified in Section 2529 shall have presented to the division evidence that such institution complies with the criteria set forth in Section 1374.
(b) In its discretion the division may register an applicant who graduated from an equivalent institution before the time of its approval by the division, if the program undertaken by the applicant as a student otherwise complies with the provisions of Section 1374.

APPENDIX E

The following are allegations from petitioners' Third Amended and Supplemental Complaint filed in the district court in this case, at ¶¶ 91 to 95 (ER-46 to ER-50); Exhibit 2 pages 4 to 17 (ER-138 to ER-151); and Exhibit 3 pages 12 to 15 (ER-172 to ER-175).

THIRD AMENDED AND SUPPLEMENTAL COMPLAINT

* * * * *

91.

Psychoanalysis has been called the "talking cure." It is a treatment based on verbal communication between the analyst and client. Its aim is to promote emotional growth through insight, character change, personal integration, and a lessening of symptoms that originate in the client's mind or emotions. It is based on extensive scientific research into human behavior and inner experience. The term psychoanalyst identifies practitioners from various schools of thought including Adlerian, Existential, Eclectic, Ego-Psychology, Freudian, Jungian, Modern Freudian, Object Relations, and Self Psychology.

92.

Psychoanalysis encompasses both a theory of the mind and a clinical method. The clinical method consists of an ongoing, intensive discussion between the analyst and

analysand (i.e., client) in which the client talks at length about his or her past experiences, present impressions, complaints, wishes and emotions. The analyst listens with discernment, asks questions, offers explanations, and provides a treatment process that includes the recognition and discussion of: The client's unconscious processes, conflicts and desires; The significance of childhood experiences and other developmental influences; And the impact of resistances, defenses, transference and countertransference phenomena. The analyst is trained to recognize those psychological phenomena through methods such as the interpretation of the client's dreams, slips of the tongue, fantasies, day dreams, and other manifestations of the client's unconscious. That training enhances the therapeutic effect of the discussions. Psychoanalysis is further described in Exhibit 2 hereto. The association between the analyst and analysand is deep, intimate, personal and lengthy. The analysand typically sees the analyst two to five hours a week for two to five years or more. The analysand talks openly and in detail about the most intimate and important aspects of his or her life, emotions and thoughts. The conversations typically take place pursuant to a regular schedule, at a private office or home where they will not be interrupted or distracted. Strong emotional bonds develop between the analysand and analyst, and are an expected part of the therapeutic process. Expression is an essential component of the process. The analysts' skills at therapeutic conversation, which they develop through their highly specialized training in psychoanalytic theory and technique and which they hold out as the essence of their service, allows them to foster the emotional bonds (including the transference relationship) and the insightful observations and interpretations that lead to deep and beneficial change in the analysands.

Psychoanalytic Training

93.

The training generally considered essential to the practice of psychoanalysis, and which forms the basis for both NAAP's membership standards and registration under California's research psychoanalyst law, consists of:

- A personal training psychoanalysis;
- Clinical experience in psychoanalysis under the supervision of a trained analyst;
- Courses in psychoanalytic theory and technique.

The personal analysis is the core of the training program. The purpose of requiring candidates to undergo their own psychoanalysis is to train them to use their personality in a therapeutic way, and to free them of personality biases or emotional conflicts that might interfere with their ability to understand and help others.

94.

Psychoanalytic institutes of all orientations share these three basic training requirements. Plaintiff Monte's institute, the C.G Jung Institute of Zurich, requires that each candidate complete at least four to five years of training (depending on the program), that must include at least 300 hours of personal analysis, 300 to 500 hours of clinical experience, and examinations in subjects related to Jungian psychology taught in scheduled lectures and seminars. Plaintiff Sowers' institute, NPAP, currently requires candidates to complete at least 450 hours of personal analysis, 360 hours of supervised clinical experience, two control analyses of one to two years

each with at least 150 hours of supervision, and 26 courses in psychoanalysis that include 18 classroom hours per course. All or most institutes from which NAAP's members have graduated require at least: 300 hours of personal analysis; 300 hours of supervised clinical experience and 150 hours of supervision on at least two cases; and 36 credit hours (or 375 classroom hours) of courses on psychoanalytic theory and technique. Psychoanalytic training usually takes at least four years to complete.

95.

California law does not impose general training requirements for psychoanalysts. The only California law that identifies a psychoanalytic training standard is the Research Psychoanalyst Law. It permits persons, who may have no professional license in any field, to "engage in psychoanalysis as an adjunct to teaching, training, or research and hold themselves out to the public as psychoanalysts" if they have graduated from one of four specified California psychoanalytic institutes, or an institute "deemed equivalent" (Code § 2529). The Research Psychoanalyst Regulations:

- Limit a research psychoanalyst to "render[ing] psychoanalytic services on a fee-for-service basis for not more than an average of one-third of his or her total professional time including time spent in practice, teaching, training or research" (16 CCR § 1371);
- Require a doctoral degree in some field, which need not be a mental health field and usually is not (16 CCR § 1374(c));
- Provide that "equivalent" psychoanalytic institutes shall require each student to complete

> a minimum of: 300 hours of personal psychoanalysis; three psychoanalyses with a minimum of 150 hours of case supervision; and 560 hours of classroom training over at least three years (16 CCR § 1374(e), (g) and (h), and § 1373(c)).

Those requirements do not apply to licensed physicians, psychologists, social workers, marriage, family and child counselors, and "any other persons * * * exempt from other state licensure laws." Those persons may practice "research psychoanalysis" without satisfying any state mandated standard for psychoanalytic training (16 CCR § 1369). The California Department of Consumer Affairs ("DCA"), in its Report to the California Joint Legislative Sunset Review Committee dated February 1998, recommended that the "license categor[y] for research psychoanalysts * * * should be abolished" because "Licensure of research psychoanalysts * * * does not afford consumers any protection and its abolition poses no threat to consumers' health and safety." The Sunset Review Committee staff also determined that this regulated category appeared to pose no threat to public safety. On March 17, 1998, the Joint Committee adopted the recommendation of the Department and of Committee staff to eliminate the registration requirement for research psychoanalyst. Since that date, research psychoanalysts contacted the Committee with concerns that eliminating the registration program would prevent them from practicing. Legislative Counsel then determined that if the registration program was repealed, sections 2902(c) and 2903 of the Psychology Licensing Law would prevent research psychoanalysts from practicing psychoanalysis unless they were licensed as psychologists or somehow exempt under current law. In light of those facts, the Chairman of the

Sunset Review Committee, Leroy Greene, decided to not propose any changes to the research psychoanalyst law, and requested the Medical Board to report to the Joint Committee on whether or not registration of research psychoanalysts by the Medical Board is still necessary. The above proceedings and request were set forth in a letter from Chairman Greene to the executive director of the Medical Board, Ron Joseph, dated April 8, 1998. In response, Mr. Joseph sent a letter to all research psychoanalysts dated June 25, 1998, discussing the issue, and stating in pertinent part: "[T]he recommendation to sunset the registration program was made by the Department of Consumer Affairs. Their recommendation was based on the following: (a) there is little consumer protection provided by the program; (b) there have been few complaints received, and; (c) there is minimal work or cost associated with this registration program. I should add that the intent of the DCA's recommendation was not to prohibit the practice of research psychoanalysts, but to eliminate what appeared to be an unnecessary program. Because of the laws governing psychology, however, elimination of the registration program would not allow the research psychoanalysts to continue practicing legally unless they were also licensed psychologists. Practically speaking, DCA was correct in that there seems to be minimal oversight necessary relating to this class of practitioners. Only one complaint was received in the last four years, and that was a meritless complaint that the person was practicing psychology without a license. * * * The program is of no benefit to the [Medical] Board, nor, given the history, to the consumer, but the minimal cost associated with the program is covered by the fees collected. * * *" Mr. Joseph invited research psychoanalysts to present their views on the issue at the August 1, 1998 meeting of the Medical Board. The issue was

considered by the Medical Board at that meeting. The Medical Board decided that the program should not be eliminated or changed at this time, and notified Chairman Greene of that position. The Medical Board's records show only the one record of a complaint against a research psychoanalyst, which was meritless (for the reason alleged above), and show that no disciplinary action has ever been taken against a research psychoanalyst.

* * * * *

COMPLAINT EXHIBIT 2
(Declaration of [petitioner] Lionel Corbett)

7. i. Theory. All psychoanalysts are agreed that human personality, or the development of a self, is the result of the interaction of inborn, constitutional factors with significant childhood events. Especially important are the emotional atmosphere at home and the child's relationship with parents, siblings and early care-givers. It is generally agreed that there is a level of the mind, referred to as the unconscious, that is not amenable to direct introspection. The unconscious is known to have powerful effects on motivation, thoughts, feelings and behavior, and often gives rise to inexplicable, often compulsive, addictive and self-destructive acts. It is axiomatic in psychoanalysis that apparently meaningless symptoms become meaningful when their unconscious underpinnings are revealed.

8. The unconscious profoundly affects relationships, often distorting them in a repetitive manner. Because the origin of these problems are unconscious, the sufferer is bewildered about why he or she behaves in a

hurtful or damaging manner, but has no access to the level of the mind where these problems originate. It is generally agreed that psychoanalysis is able to bring the unconscious origin of such difficulties to light, which helps to free the person from compulsive submission to unknown forces within the personality. It is also agreed that the unconscious manifests itself within dreams and fantasies, although different schools of psychoanalysis understand such material from different points of view.

9. Psychoanalysts of all schools of thought are agreed about the therapeutic value of a relationship that allows sustained, collaborative enquiry into human experience, enquiry that links past and present, reality and fantasy, self and other, inner and outer, conscious and unconscious. All are agreed that this process takes time, courage, commitment, and intense personal effort on the part of both participants, but that the outcome allows greater freedom, deeper self understanding and enhanced meaning in life.

10. ii. Practice. It is agreed that the relationship between analysand and analyst is the main healing instrument. The two participants meet regularly for a fixed time, usually 45-50 minutes several times a week, for an agreed-upon fee. With the help of the analyst, the client tries to put into words his or her thoughts, feelings and memories. The psychoanalyst listens intently to the analysand, and comments verbally as and when something helpful can be said. The psychoanalyst interprets and clarifies what is happening according to his or her understanding of what the analysand says. The content of these interpretations varies with the analyst's theoretical approach, but is always a verbal

explanation or comment on the situation. Essentially a verbal interpretation is the analyst's opinion, and it is modified according to its effect on the analysand, who may feel helped by it or who may disagree with it, in which case the analyst will modify his or her understanding of the situation until it resonates emotionally with the analysand. The analyst carefully notes his or her own emotional reactions to what is being said by the analysand, and uses these reactions as important guides to the analysand's inner world, but is careful not to allow these reactions to intrude in a damaging manner. Self-disclosure of the analyst's own inner world is generally discouraged.

11. As the relationship between the participants intensifies, two broad developments are possible. First, the original situation with the parents may be recreated with the therapist, often in subtle ways. This recreation is referred to as the "transference," because it involves the transference of feelings from an original care-giver in the past to the psychoanalyst in the present. Many aspects of the childhood situation are so unconscious that they can only be understood by means of their recreation, which allows the analyst to point out the nature of the childhood difficulties. In turn, this new consciousness allows the analysand to realize what happened in childhood to cause him or her pain, and allows the analysand to gain some distance from the original trauma. The analysand may then bring to bear his or her adult capacities to the situation, instead of dealing with it from a child's perspective. At the same time as the healing of the original trauma occurs, the analyst also provides a new type of relationship to the analysand. This relationship is of a kind that was needed in childhood but which was then not available. For example, the psychoanalyst has to

empathically sense the nature of emotionally intense needs, involving aspects of the analysand's personality that no one has previously recognized. Or, the psychoanalyst has to be able to sense and then articulate very painful emotional states that the analysand has so far had to deny, repress or otherwise sequester. The analyst also has to be a source of understanding, comfort, support and strength during the reactivation of early painful states of mind. The provision of such important emotional sustenance allows the thwarted developmental train to get back on track. The combination of the re-working of the old trauma and the supply of what is needed for arrested growth has a healing effect. It is generally agreed that such personality change only occurs when the analysand is strongly emotionally affected by the work, since intellectual understanding alone has little effect.

12. Analysis is complicated by the fact that the analysand understandably may resist the exploration of material that feels too painful to deal with. To try to avoid these feelings, the analysand uses a variety of defense mechanisms that were first deployed in childhood to deal with an intolerable situation. These defenses are those such as denial--"this is not happening," splitting off of feelings--"this is happening but it does not really matter," or projection--"there is nothing wrong with me, other people are the problem." When these defenses are used in the course of psychoanalysis, they tend to derail or slow the process. The analyst then has to use considerable tact, empathy and technical judgement in order to decide when, and in what way, to interpret to the analysand that such resistance is occurring.

* * * * *

15. Often, the analyst has nothing except his or her own humanity with which to be helpful. In most psychoanalytic situations, the relationship and the verbal and non-verbal interchange between the two people are the only factors involved. Psychoanalysts do not use psychological testing or any form of instrumentation or other medical procedure. (Rarely, medication may be used as an adjunct, in situations where the analysand is otherwise too depressed or disturbed to benefit from analytic therapy).

* * * * *

23. The Jungian movement has added a further complication to psychoanalytic theory and practice. Whereas traditional psychoanalysis only recognizes personal levels of the psyche, Jung discovered that the psyche also has transpersonal levels, which contain deep structures or patterns that make us generally human. These principles, that he called archetypes, are the depth psychological analogues to the laws of thermodynamics that are used in physics. Just as the laws of physics describe the way in which matter behaves, so the archetypes describe the lawfulness of the psyche. The archetypes are general patterns of human behavior that are reflected in the myths, fairy tales and religions of all human cultures. The recognition of the archetypal level of the psyche within ones own life allows the individual to find common ground in his or her own life with the cultural history of humanity. We find that this discovery itself has a healing effect. Jung also discovered that there is an image of the divine at the core of the human personality. He called this principle the Self, which he distinguishes from the personal self or the empirical personality. The Self is the central organizing principle within the person, acting as a kind of blueprint for development.

24. Jung's discoveries have not been widely accepted in academic circles, for several reasons. Some psychologists are afraid that Jung's work encroaches on the spiritual dimension, which they would like to insulate from clinical practice. In fact Jung's theory can be practiced with a spiritual sensibility, which is exactly Jung's appeal for psychoanalysts who feel that a person's spirituality cannot be separated from his or her psychology.

* * * * *

36. Contrary to popular belief, psychoanalysis has not gone out of fashion. It is true that psychoanalysis has lost the near monopoly that it once had in the field of psychotherapy. Because of the increasing control of the insurance industry and government over payment for psychotherapy, the modern vogue is towards very short term therapies for emotional distress. These brief therapies are problem-oriented and aim at changing symptoms. This philosophy of treatment appeals to the current emphasis on rapid change, demonstrable cost-effectiveness and productivity. However, it is also true that the number of psychoanalysts and of psychoanalytic patients has been steadily increasing. This seems to be because more and more people resist superficial fixes of profound personality problems. They realize that in order to get well they must systematically and deeply explore their inner life, and that for this purpose a well-trained guide is essential. Psychoanalysis is often considered a luxury in the days of increasing health care costs. But various researchers point out that the psychological well-being achieved by psychoanalysis markedly reduces the person's need for costly treatment of alcoholism, addiction and various physical disorders with a psychological component. * * *

* * * * *

COMPLAINT EXHIBIT 3
(Affidavit of [petitioner] Cedrus Monte)
[unsigned, but alleged in Complaint to be true]

24. The following description of my [petitioner Monte's] practice of psychoanalysis is in addition to what is described in the formal complaint under the section entitled, "Psychoanalysis."

25. The common denominator in all sessions of my practice is the act of listening: with all my senses; with all of what I understand about the art and science of Jungian analysis; with all my life experience; with my whole being. I am as present and potentially efficacious for the analysand as my ability to enlist all these ways of listening allow. The other side of listening is to offer insight into analysands' situations and, especially, to empower them as much as possible to develop their own capacity for insight.

26. The second most prominent common denominator is offering the capacity to "hold." By this I mean to carry, for the time being, the analysand's belief in him or herself, as well as his or her conscious connection to the Self, (the sense of psychic wholeness), until the analysand has become strong enough to independently foster and nurture the self-affirmation and the experience of wholeness necessary for a healthful state of being. I believe one becomes "strong enough" by having the opportunity to openly look at and experience one's life as it is, especially one's suffering, without judgment. Common to all analytical situations is

providing the physical and emotional space for this to potentially happen.

27. The third common denominator is dependent on the presence or development of adequate ego strength, (which, depending on the level of psychological wounding, can take many months, or even years, of work). When the analysand can accept their own limitations without being overwhelmed by persecutory feelings from either within or without, we can then look at the ways in which efforts to resolve an analysand's difficulties may be sabotaged by his or her own ethical weaknesses, (or, in Jungian terms, one's shadow), thereby developing the strength and capacity for the greater self-care of one's emotional, spiritual and psychological health. By this I mean that in mutual, non-coercive, and non-judgmental inquiry, we look at the ways in which the analysand might be responsible for his or her own suffering by unconsciously abiding in attitudes that interfere with the healing process. Analysands' dreams and other images produced during the analysis are critical to arriving at the understanding of these interfering factors, for there is no one, prescribed course of action or resolution for an analysand's suffering. Through these very personal images arising from the analysand's unconscious, along with the analyst's professional guidance, analysands can eventually arrive at the understanding of their own particular needs in the development of consciousness and healing.

28. The fourth element used in common with all my analysands is introducing the means by which they can access or understand the nature of their suffering, act on their understanding, and thereby release the life-energy that is bound by the inner conflict. Hopefully, through these means

the analysand will be better able to sustain his or her own psychological health; and, eventually, without the analyst. The methods used to facilitate this aspect of analysis are varied for Jungians. As I have already mentioned above, Jung was deeply concerned with the timeless and cross-cultural world of symbols and images. He felt that our direct and authentic contact with them could precipitate or constellate healing. Dreams are one of the most personally authentic and primary set of symbols or images with which we have to work. One cannot stage a dream; it comes as it comes. And it is vitally personal. They are highly individual images that have happened to us as a kind of gift or message. It is the analyst's task to help the analysand make sense of this message for the sake of furthering their wholeness or healing.
* * *

* * * * *

35. To paraphrase this in a more direct manner, I would say that Jung's self-stated main concern is to help the analysand open to an event of a deep spiritual nature in which he or she can experience a life-altering, life-affirming, (re)connection to a transcendent source. Quite clearly, an analyst cannot "do" this for the analysand, or make that happen in the analysis. However, the analyst's understanding of an event of this nature through personal life experience, through his or her own analysis, and through his or her training (especially in working with symbols, images, dreams), can provide the context in which this can happen. Many people who choose to work with a Jungian analyst do so because they know that this aspect of life is firmly considered in Jung's psychology, and that there is room for

discussing the experience of it's occurrence in the analysand's life.

36. Each person is individual and will, therefore, be approached in analysis in a way unique to them, with the elements I have described above as methods for the approach. I believe one of Jung's greatest contributions to psychology is what he formulates as the individuation process. This is the cornerstone of Jung's work, postulating the necessity for allowing the real essence or truth of one's life to unfold in the manner appropriate to the individual; and in meaningful concert with others. Every person has his or her own destiny to fulfill by growing into his or her own truth. No one can determine that truth for another. One must discover what it is for oneself, the act of which is a matter of great consequence in determining one's healing and health. When I am working with my analysands, it is this truth which I try to help them awaken to, and live.

Supreme Court, U.S.
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No. 00-1281

In The

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, CEDRUS MONTE, ALLAN D. SOWERS, and LIONEL CORBETT,

Petitioners,

v.

CALIFORNIA BOARD OF PSYCHOLOGY'S EXECUTIVE OFFICER THOMAS O'CONNER and BOARD MEMBERS MARTIN GREENBERG, et al., and BILL LOCKYER, CALIFORNIA STATE ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether California's mental health licensing scheme passes First Amendment scrutiny when, as the Court of Appeals ruled, "[i]t is properly within the state's police power to regulate and license professions," "given the health and safety implications, California's interest in regulating mental health is even more compelling than a state's interest in regulating in-person solicitation by attorneys," and "the licensing scheme is rationally related to California's interest in protecting the mental health and safety of its citizens."

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STATEMENT OF THE CASE

Petitioners' statement of the case contains many assertions which are extraneous to the issues presented and omits relevant facts. In its published opinion, the Court of Appeals for the Ninth Circuit provided an accurate and complete explanation of the factual and procedural background of the case. (Appendix A to the Petition ("App. A") at 3a through 9a.) Respondents adopt that explanation as their statement of the case and incorporate it here by reference.

REASONS FOR DENYING THE WRIT

THE NINTH CIRCUIT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S PRIOR DECISIONS

A. Laws and Regulations Governing Professions are Properly Reviewed Using the Rational Relationship Test

The Ninth Circuit concluded that California's psychology licensing laws are rationally related to the state's legitimate interest in safeguarding the mental health of its citizens and do not infringe upon petitioners' right to free speech. This decision is in no way unique or remarkable. It is wholly consistent with a long line of Supreme Court decisions going back at least as far as 1889. (*Dent* v. *West Virginia,* 129 U.S. 114 (1889).) This Court has repeatedly held "the States have a compelling interest in the practice of professions within their boundaries, and . . . as part of their power to protect the public health, safety, and other

valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." (*Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975) (lawyers); *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (pharmacists); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 488 (1955) (ophthalmologists, optometrists, opticians); *Graves* v. *Minnesota*, 272 U.S. 425, 427-28 (1926) (dentists); *Douglas* v. *Noble*, 261 U.S. 165, 167, 169-70 (1923) (dentists); *Watson* v. *Maryland*, 218 U.S. 173, 176, 179-80 (1910) (doctors); *Dent*, 129 U.S. at 122 (doctors).) Such licensing schemes are subject only to rational basis review. (*Ibid.*)

The federal courts of appeals have followed this Court's lead, uniformly holding the licensing of professions to be within a state's police powers and properly reviewed using the rational basis test. (*Lange-Kessler* v. *Dept. of Educ. of State of N.Y.*, 109 F.3d 137, 140 (2d Cir. 1997) (midwives); *Sammon* v. *New Jersey Bd. Of Medical Examiners*, 66 F.3d 639, 645 (3d Cir. 1995) (midwives); *Mitchell* v. *Clayton*, 995 F.2d 772, 774 (7th Cir. 1993) (acupuncturists); *Maguire* v. *Thompson*, 957 F.2d 374, 377 (7th Cir.), *cert. denied*, 506 U.S. 822 (1992) (naturopaths); *Abramson* v. *Gonzalez*, 949 F.2d 1567, 1580 (11th Cir. 1992) (psychologists); *Giannini* v. *Real*, 911 F.2d 354, 358 (9th Cir. 1990), *cert. denied*, 498 U.S. 1012 (1990), *rehearing denied*, 498 U.S. 1116 (1991) (lawyers); *Accountant's Soc. Of Virginia* v. *Bowman*, 860 F.2d 602, 603-04 (4th Cir. 1988) (accountants); *Lucero* v. *Ogden*, 718 F.2d 355, 359 (10th Cir. 1983), *cert. denied*, 465 U.S. 1035 (1984) (lawyers).) Petitioners have cited no case and respondents know of none which holds otherwise.

B. California's Laws Governing the Practice of Psychology, Like Laws and Regulations Governing Other Professions, Are Properly Reviewed Using the Rational Relationship Test

There is no basis for distinguishing this case from the unbroken string of cases preceding it which hold that the licensing of professions is reviewed using the rational relationship test. Petitioners' claim that the practice of psychoanalysis is "pure speech" is unavailing. First, as the Ninth Circuit, and the District Court before it, noted, "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. . . . That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." (*NAAP* v. *California Bd. Of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000); App. A at 23a. Emphasis in original; interior quotation marks omitted.)

There is no doubt that the practice of psychoanalysis involves speech. So, too, does the practice of law. (*Legal Services Corporation* v. *Velazquez*, ___ U.S. ___, Nos. 99-603, 99-960, 2001 WL 193738 (February 28, 2001) recognizing that legal advice and argument constitute speech and that, therefore, it is a violation of the First Amendment right to free speech for Congress to prohibit legal services lawyers from challenging existing welfare law on behalf of their clients; *Paciulan* v. *George*, 229 F.3d 1226, 1230 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 775 (2001).)

Nonetheless, this Court has consistently held that laws regulating admission to the legal profession are subject to rational basis review (*Ohralik* v. *Ohio State Bar*

Assn., 436 U.S. 447, 459 (1978); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 772, 792 (1975); *Konigsberg* v. *State Bar*, 366 U.S. 36, 49, 53 (1961); *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 239 (1957)) and the federal courts of appeals have followed suit (*Paciulan*, 229 F.3d at 1229, 1230; *Tolchin* v. *The Supreme Court of the State of New Jersey*, 111 F.3d 1099, 1114 (3d Cir.), *cert. denied*, 522 U.S. 977 (1977); *Scariano* v. *Justices of Supreme Court of Ind.*, 38 F.3d 920, 923 (7th Cir. 1994), *cert. denied*, 515 U.S. 1144 (1995); *Lawline* v. *American Bar Ass'n*, 956 F.2d 1378, 1385, 1386 (7th Cir. 1992) (holding that a licensing scheme governing lawyers is subject to rational basis review and that "[a]ny abridgment of the right to free speech is merely the incidental effect of observing an otherwise legitimate regulation"), *cert. denied*, 510 U.S. 992 (1993); *Giannini* v. *Real*, 911 F.2d at 358; *Goldfarb* v. *Supreme Court of Virginia*, 766 F.2d 859, 861 (4th Cir. 1985), *cert. denied*, 474 U.S. 1086 (1986); *Lupert* v. *California State Bar*, 761 F.2d 1325, 1328 (9th Cir. 1985); *Lucero* v. *Ogden*, 718 F.2d at 359; *Feldman* v. *State Board of Law Examiners*, 438 F.2d 699, 705 (8th Cir. 1971)).

Justice White, concurring in *Lowe* v. *S.E.C.*, 472 U.S. 181, 232 (1985), offered a useful method of distinguishing the regulation of a profession from the regulation of speech:

> "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. . . . [T]he professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who

> may practice the profession, it cannot be said to have enacted a limitation on freedom of speech . . . subject to First Amendment scrutiny."

The key, then, to "distinguishing between occupational regulation and abridgement of first amendment liberties is in finding a personal nexus between professional and client." (*Bowman*, 860 F.2d at 604.) Such a personal nexus does exist between a psychoanalyst and his or her patient. No such nexus exists to justify a similar licensing scheme addressed to the regulation of professional musicians, poets, playwrights, and the other artistic professions with which petitioners attempt to identify themselves.

The Ninth Circuit's decision that California's psychology licensing laws do not infringe upon petitioners' right to free speech is supported by over a century of precedent. Doctors, dentists, accountants, and the many other professionals whose licensing laws have routinely been reviewed under the rational relationship test all give counsel and advice in the practice of their professions. All employ speech. The practice of law is almost exclusively speech. Yet, for licensing purposes, the effect on speech is considered incidental. Therefore, it is immaterial that the court below made a secondary finding that California's licensing scheme is content and viewpoint neutral. It does not matter because speech is not at issue. The finding is irrelevant and does not alter the correctness of the court's decision.

California's Psychology Licensing Law does not raise First Amendment concerns. It prohibits unlicensed persons from engaging in the practice of psychotherapy for a fee; it does not impose restrictions on their public speech.

Finding that the statutes and regulations at issue implicated neither a suspect classification nor a fundamental right and that the goal of protecting the public health and safety warranted California's system of licensing psychologists, the Ninth Circuit concluded that "the psychologist licensing scheme is rationally related to legitimate government interests." (*NAAP*, 228 F.3d at 1053; App. A at 20a.)

CONCLUSION

The decision of the Ninth Circuit is in complete conformity with the opinions of this Court on professional licensing and there is no conflict among the circuits on this issue. This case raises no question requiring this Court's attention. For these reasons, respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOANALYSIS, CEDRUS MONTE, ALLAN D. SOWERS, and LIONEL CORBETT,

Petitioners,

v.

CALIFORNIA BOARD OF PSYCHOLOGY'S EXECUTIVE OFFICER THOMAS O'CONNOR and BOARD MEMBERS MARTIN GREENBERG et al., and BILL LOCKYER, CALIFORNIA STATE ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED BY RESPONDENTS (rephrased)

Whether the Court of Appeals erred in applying First Amendment scrutiny to California's scheme for licensing psychoanalysts, instead of applying only the Fourteenth Amendment rational basis test.

QUESTIONS PRESENTED BY PETITIONERS

Whether the Court of Appeals erred in holding that the "licensing scheme passes First Amendment scrutiny" for content-neutral laws, without finding or requiring respondents to prove that it is reasonable, beneficial, and narrowly tailored.

Whether California's licensing scheme is content and viewpoint based, when:

(a) It restrains only speech with psychological content;

(b) Its goal is to regulate "wise . . . counseling" and the emotive impact of speech on willing listeners;

(c) Its method is to coerce unwilling psychoanalysts to study non-psychoanalytic viewpoints for years.

Whether California's scheme for licensing psychoanalysts is a prior restraint on pure speech that presumptively violates the First and Fourteenth Amendments to the United States Constitution.

1. Respondents question whether the Court of Appeals erred in applying First Amendment scrutiny at all.

Respondents do not engage the points and authorities in the Petition. Instead, they argue that the Court of Appeals' decision can be affirmed on another ground, one that itself raises constitutional issues that also merit review. Respondents phrase their question in material part as follows:

> "Whether California's mental health licensing scheme passes **First Amendment scrutiny** when, as the Court of Appeals ruled, * * * 'the licensing scheme is **rationally related** to California's interest in protecting the mental health and safety of its citizens.' "

Opposition Brief at i (emphasis added), *quoting* Petition Appendix A ("App A") at page 14a.

That question should be rephrased for two reasons. First, it wrongly implies that the rational basis test *is* "First Amendment scrutiny," when it is "Fourteenth Amendment scrutiny" (*see* App A at 11a). The ruling on the rational basis test quoted in respondents' question is from the court's analysis of petitioners' Fourteenth Amendment claims, not their First Amendment claims. *See* App A at 14a.

Second, respondents wrongly suggest that California's entire "mental health licensing scheme" is at issue, when petitioners challenge only the scheme's restraint on their private practice of psychoanalysis. Heightened scrutiny may apply to that restraint but still not apply to

other aspects of the licensing scheme, such as its regulation of psychometric or behavioral psychology, or of publicly funded health services.

Properly phrased, the question presented by respondents is whether the Court of Appeals erred in applying First Amendment scrutiny at all to California's licensing scheme for psychoanalysts.

2. This case presents important questions on the scope of First Amendment protection for the emotive impact of speech and professionals who specialize in it.

This Court has often held that the First Amendment protects the "primary effect" and "direct impact" of speech, including "the emotive impact of speech on its audience." *See* Petition at 18-19, *quoting Reno v. ACLU*, 521 U.S. 844, 868 (1997) and *Boos v. Barry*, 485 U.S. 312, 321, 334 (1988). That impact includes the potential for "psychological damage." *Boos v. Barry*, 485 U.S. at 321 (1988). Respondents' Brief does not contest that.

Indeed, this Court has held that the First Amendment protects even patently offensive speech by hateful individuals who intend to inflict severe emotional distress. *See, e.g., Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Madsen v. Women's Health Center*, 512 U.S. 753, 774 (1994); *National Socialist Party v. Village of Skokie*, 432 U.S. 43 (1977).

Yet respondents essentially argue that the First Amendment does *not* protect insightful speech by highly educated, well-meaning individuals whose only intent is

to *relieve* emotional suffering and depression by promoting insight, personal integration and spiritual growth. That simply makes no sense.

Respondents rely on the Court of Appeals' statement that psychoanalytic " 'treatment of emotional suffering and depression[is] *not* speech,' " Opposition Brief at 3, *quoting* App A at 21a-22a (and App B at 43a), even though speech is the *only* means employed. *See* Petition at App E. *See generally,* Sigmund Freud, *The Question of Lay Analysis* (1926), translated and edited by J. Strachey (W.W. Norton & Co., New York: 1978) at ch. 6 pp. 68-69 ("analysis * * * consists only in talking and an exchange of information"); M. Gill and I. Hoffman, *Analysis of Transference Volume II: Studies of Nine Audio-Recorded Psychoanalytic Sessions,* (International Universities Press, Inc., New York: 1982).

The notion that the therapeutic effect of speech is "*not* speech" finds no support in Supreme Court precedent, and is inconsistent with the precedent cited above. The Court of Appeals' statement to that effect is an important error that this Court should review.

Respondents also argue that First Amendment scrutiny never applies to professional licensing schemes because speech is merely "incidental" to any profession in which one "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client." Opposition Brief at 4, *quoting Lowe v. S.E.C.,* 472 U.S. 181, 232 (1985) (White, J., concurring).

First, this Court has never squarely ruled on the question of when heightened First Amendment scrutiny applies to the licensing of professions. The issue has been

addressed by members of this Court primarily in concurring opinions by Justice White in *Lowe* and Justice Jackson in *Thomas v. Collins*, 323 U.S. 516, 544-548 (1945). This case presents a timely opportunity for this Court to fully address that important issue.

Second, Justice White also stated that "the principle that the government may restrict entry into professions * * * has never been extended to encompass the licensing of speech *per se*," and he agreed that in prior cases "the distinguishing factor was whether the speech in any particular case was 'associat[ed] . . . with some other factor which the state may regulate so as to bring the whole within official control.' " 427 U.S. at 229-230, 231-232, *quoting Thomas v. Collins*, 323 U.S. at 547 (Jackson, J., concurring).

Psychoanalysis is not associated with any non-speech factor that justifies bringing it within official control. The only "affairs" that psychoanalysts take "in hand" are thoughts, feelings and emotions. Clients have First Amendment rights in those affairs. The government may not regulate them. Justice White was certainly not referring to psychotherapy when he characterized speech as incidental to some professions. He was referring to advice on clients' financial, legal and medical affairs. Such advice is closely associated with non-speech "factors" such as stock transactions, legal proceedings, medicine and surgery that "the state may regulate so as to bring the whole within official control." That is a key distinction between those professions and psychoanalysis.

Respondents' contention that the "practice of law is almost exclusively speech" (Opposition Brief at 5) ignores the close association between lawyers' speech and the conduct of clients, courts and law enforcement officers that the government may regulate, and that justifies regulation of the profession as a whole. In contrast, legal advice without that close association may be protected by the First Amendment. *See, e.g., United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985) (Opinion by Kennedy, J.) (First Amendment defense applies to defendant accused of giving illegal tax advice unless the "speech is so close in time and substance to ultimate criminal conduct that no free speech defense is appropriate"), *cert. den.* 476 U.S. 1120 (1986).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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